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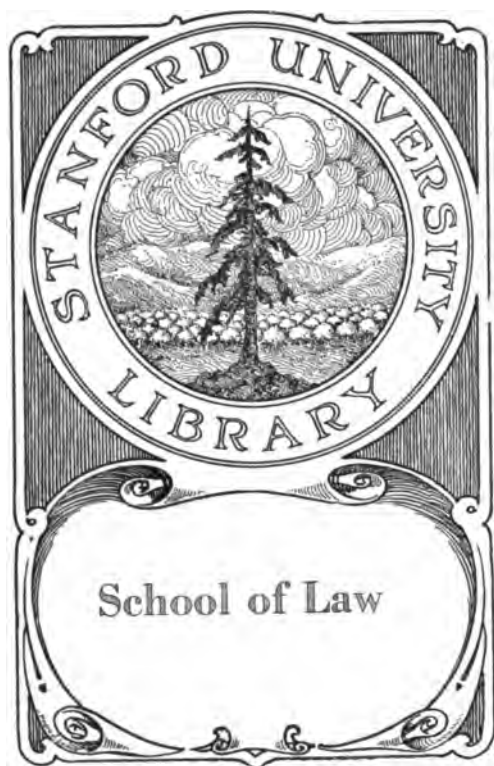
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THE

CANADA LAW JOURNAL.<sup>92</sup>

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VOLUME XX.

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**From January to December, 1884.**

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TORONTO:

1884.

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No. 1.

## DIARY FOR JANUARY.

1. Tues. ... **New Year's Day.**
3. Thur. ... Toronto and Hamilton Assizes commence.
5. Sat. ... Christmas vacation H. C. J. ends.
6. Sun. ... **Epiphany.**
7. Mon. ... Co. Court Term commences. Sur. Ct. Term commences. Christ. vac. in Exch. Ct. Canada ends.
8. Tues. ... Court of Appeal Sittings begin.
10. Thur. ... Christmas vacation in Sup. Ct. of Canada ends.
11. Fri. ... Sir Charles Bagot, Governor-General, 1842.
15. Sat. ... County Ct Term ends. Surrogate Ct Term ends.
22. Sun. ... **First Sunday after Epiphany.**
13. Mon. ... Primary Ex. for Students and Articled Clerks begin.

TORONTO, JAN. 1, 1884.

## BUSINESS NOTICE.

*Until further announcement all communications to this Journal, whether on business or otherwise, are to be addressed to "CANADA LAW JOURNAL, 68 Church St., Toronto." All remittances are to be made to the Proprietors of the Canada Law Journal at the same address.*

IN *Re Sneyd ex p. Fewings* (*Law Times Rep.*, Dec. 8th, 1883, p. 103), recently before the English Court of Appeal (Cotton, Landley and Fry, L. J. J.), the question as to the amount of interest recoverable after judgment on a covenant for the payment of money with interest, was again considered, and it was held that the covenant was merged in the judgment, and that although the covenant was for the payment of interest at five per cent.; yet after judgment only four per cent. could be recovered. Fry, L. J., however, referring to *Popple v. Sylvester*, 22 Ch. D. 98, pointed out that the covenant might be so framed as to enable the covenantee to recover the covenanted rate even after judgment.

## MECHANIC'S LIENS.

*McPherson v. Gege*, noted in our last issue at p. 400, is an important decision on the practice in suits to enforce mechanics' liens. The 15th section of the *Mechanic's Lien Act* (R. S. O. c. 120) provides that "any number of lien-holders may join in one suit, and all suits brought by a lien-holder shall be taken to be brought on behalf of all the lien-holders of the same class; and in the event of the death of the plaintiff therein, or his refusal or neglect to proceed therewith, may by leave of the court in which the suit is brought, on such terms as may be deemed just and reasonable, be prosecuted and continued by any other lien-holder of the same class."

In *McPherson v. Gege* it seems that the original plaintiff in the action had, before judgment, consented to its dismissal, but the court, on the application of another lien-holder of the same class, restored the action except as to the claim of the original plaintiff, and permitted the applicant to prosecute the action. Usually in a class suit the plaintiff is *dominus litis* until judgment, and may, before judgment, consent to its compromise or dismissal, and the rest of the class for whose benefit the action is brought cannot intervene to prevent the dismissal. This principle was recognized by the Court of Appeal in the case of *Smith v. Doyle*, 4 App. R. 471. Burton, J. A., at p. 477, thus refers to it:—"No authority was cited for the position that a creditor, who could file a bill in his own behalf to set aside a fraudulent conveyance, could, by suing on behalf of other creditors, preclude them from taking similar proceedings on their own behalf. *It continues until decree to be the suit of the actual plaintiff alone.* He has a right either to dismiss, or compro-

## MECHANIC'S LIEN—STANDARD TIME.

mise it. But when a decree is made, the case is different. He ceases then to have absolute control, and the general body of creditors, for whose benefit the decree is made, become entitled to intervene."

It will thus be seen that the result of *McPherson v. Gege* is to establish that suits to enforce mechanics' liens differ from other class suits so far as regards the rights of other members of the same class as the actual plaintiff to intervene therein. In such actions they have not only the right to intervene and prosecute the action before or after judgment, where the original plaintiff neglects, or refuses to do so, but the latter's right to consent to a compromise, or a dismissal, of the action, is practically confined to his own claim, and the action may be restored if any other member of the class choose to intervene. We observe that Mr. Justice Galt is reported to have dissented from the majority of the court, on the ground that the applicant was not of the same class as the original plaintiff; we are inclined to think too, that the decision goes a little beyond the strict letter of the Act. The intervention which the 15th section appears to contemplate is an intervention in an existing action, not an intervention in an action which has been dismissed. The conclusion which the court arrived at, however, is a very reasonable and proper one, even if it does savor a little of judicial legislation, but we fear it may be found to lead to some difficulty in practice. The question must inevitably arise, as to the effect of parties acquiring rights between the dismissal of an action, and its subsequent restoration on the application of another lien-holder of the same class. Will persons thus acquiring rights, be nevertheless bound by the claims of other lien-holders who apply to restore the action? or will they take free from such claims? Until this question is determined, it is clear that another and very dangerous obstacle is placed in the way of persons dealing with lands on which mechanic's liens exist. The difficulty is complicated by the fact, that

after an action is commenced, it ceases to be necessary for any lien-holder of the same class as the plaintiff to register his lien; consequently it must become a matter of serious difficulty to ascertain, when an action is dismissed, who the other lien-holders of the same class are, who are entitled to intervene, and whether or not their claims have been satisfied.

## STANDARD TIME.

"Time was made for slaves." So thought the freeborn Britons at Quebec, when the garrison gun, fired by a Dominion officer, made it "eight bells," when old Sol made it 25 minutes past twelve. The same thought occurred to the clerks in government offices at Ottawa, when the clock of the House of Parliament was put on three minutes for the same reason. And for *what* reason? Because the railway magnates thought proper to reconstruct their time tables on some arbitrary system arranged for the convenience of their traffic.

It may be good for us, living in the City of Toronto, to be compelled to go to bed 17 minutes earlier than usual; but what about getting up so much earlier in the morning. We are creatures of habit as well as freeborn Britons, and we object to what is left to us of life being made more of a burden than necessary by having to breakfast by gaslight.

But let us look at the effect of "following a multitude to do evil" in this matter from some less personal points of view. It goes without saying that a railway company cannot alter the time of day except for its own servants or service. Yet with an amusing lamblike passiveness the clocks of the country have been set by those of the railway companies. This must be discouraging enough for some unhappy wight who walks across an imaginary line and finds he is an hour behind time; but the present situation has some consequences of a more serious character.

## STANDARD TIME.

Suppose for example a poll closed by the "current" railway time, when by the true local time it should have been kept open some minutes longer. How would an election be affected by this action under certain circumstances, or what would be the position of a returning officer as to rejecting or receiving votes in the debateable *mauvais quart d'heure*. Night, in legal parlance, is defined for certain purposes of the criminal law as being "the time between nine o'clock in the evening and six o'clock in the morning of the succeeding day." It is easy to see how important the question of "What o'clock"? might become to a prisoner. So also in regard to an information for keeping a public house open beyond the lawful hour. Again, in matters of contract what about the expiration of a policy of fire insurance at noon on a certain day, or, finally, what would be the result of a registry office being open before or after the legal time, and an instrument recorded before or after proper hours and a loss occurring, what would be position of the parties or the Registrar? We might refer to a number of other cases where difficulties might arise, but these are sufficient.

We are not advised as to whether there is any pretended authority for the change of time that has so quietly taken place without a thought of possible consequences; but we apprehend there can be no legal authority inasmuch as neither Parliament nor Legislature has met since the change. We understand that the Attorney-General of Ontario has issued instructions that all offices under control of the Ontario Government, wherein the office hours are fixed by statute shall be opened and closed according to local time. Hence an intelligent official of our acquaintance in Toronto will have to discontinue displaying his impartiality by opening by the old time and closing by the new. Doubtless, good worthy man, he thought, like Charles Lamb, to compensate for coming late to his office in the morning by going away early in the afternoon. Some legislation will probably

be introduced on the subject next session either by the Dominion or Provincial Government. The former *may* consider it necessary for "the peace, welfare and good government of the Dominion" to do so, or the latter may find it desirable for the more safe conduct of business in public offices. It would be well that any uncertainty or cause for litigation in the premises should be removed.

That serious legal complications may arise from changes in time is illustrated by a story for the truth of which we can vouch. Mr. G. O. the head of a well known landed family in England, came to a conveyancing counsel of our acquaintance for advice under the following circumstances. It appeared that his family held certain lands under a lease for two hundred years, granted in the time of Charles II. These lands were at the time of our story in the hands of a tenant from year to year. By an excusable, but apparently fatal oversight, no notice to quit had been served on the tenant from year to year, and the two hundred year lease would terminate before the requisite six months' notice could be given; for only five months and twenty-nine days remained before the two hundred year lease would be over, which would not be till after the close of the current year of the tenancy of the tenant from year to year. The tenant from year to year had got wind, it was feared, of the position of the title. The reversioners, after the two hundred year lease, were of course unknown. The consequence was at the end of the two hundred year lease the tenant from year to year would be in the position of a disseisor, having a good title against every one but the disseisee, the original reversioners; and consequently Mr. G. O. would see a valuable property go out of his family to one who had apparently a good legal, but no moral right to it. The conveyancing counsel got him out of the difficulty. But how? We leave it to our ingenious reader to reply, and will give him till February 15th to do it in.

## RECENT ENGLISH DECISIONS.

## RECENT ENGLISH DECISIONS.

The November numbers of the Law Reports, which now come under review, consist of 8 App. 577-779; 11 Q. B. D., 609-626; 8 P. D., 185-204; 24 Ch. D., 1-252. In the first of these the case of *Ayr Harbour Trustees v. Oswald*, p. 623, though a Scotch appeal, demands notice:—

## COMPULSORY PURCHASE OF LAND—PUBLIC POLICY—INVALID CONTRACT.

The principle which this case illustrates and enforces is thus expressed in the judgment of Lord Blackburn: "I think that where the legislature confers powers on anybody to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case, the powers conferred on the body empowered to take the land compulsorily, are entrusted to them and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers, is void." In the present case, the Ayr Harbour Trustees, having statutory power to take lands for the purposes of their trust, sought to restrict their rights of user of certain lands so taken, in a manner rendering the taking of them less injurious to the owner from whom the land was being taken, and thus to procure the land for a less compensation than would otherwise have been awarded to the owner, and the Board held, on the above principle, that any contract which the trustees might enter into so restricting their rights, would be invalid.

## POWER TO LEVY TOLLS—REASONABLENESS OF CHARGES.

It is next necessary to glance at the case of *The Canada Southern R. W. Co. v. The International Bridge Co.*, p. 728, in which the decision of our Court of Appeal is affirmed. The interpretation placed upon the acts relating to the International Bridge Company, does not come within the scheme of these articles to dwell upon, but the principle laid down in respect to the determination of whether the tolls and charges made by such a company are reasonable or not, demands notice. That principle is thus stated in the judgment: "It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined, of the results to a company being so enormously disproportionate to the money laid out upon the undertaking, as to make that of itself possibly some evidence that the charge is unreasonable with reference to the person against whom it is charged."

## PROMISSORY NOTE—LIABILITY OF INDORSERS INTER SE.

The next case of *Macdonald v. Whitfield*, p. 733, is of great interest. The question was as to the rights, inter se, of the indorsers of a note made by the St. John's Stone Chinaware Company, and indorsed by the directors of the company, and discounted by the Merchants' Bank of Canada, and the appeal was from the Province of Quebec. The facts cannot well be stated shortly, nor is it necessary to state them here. The principle governing the case is thus stated, at p. 744 seq. of the judgment: "Their Lordships see no reason to doubt that the liabilities inter se of the successive indorsers of a bill or promissory note must, in the ab-

## RECENT ENGLISH DECISIONS.

sence of all evidence to the contrary, be determined according to the ordinary principles of the law-merchant. He who is proved or admitted to have made a prior indorsement must, according to these principles, indemnify subsequent indorsers. But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note, may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even investing the relative liabilities which the law-merchant would otherwise assign to them. It is in accordance with that rule that the drawer of a bill is made liable in relief to the acceptor, when the facts and circumstances connected with the making and issue of the bill sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party, according to the law-merchant, is not altered or affected by reference to such acts or circumstances, he may still obtain relief by shewing that the party from whom he claims indemnity agreed to give it him; but in that case he sets up an independent and collateral guarantee, which he can only prove by means of a writing which will satisfy the Statute of Frauds. \* \* But the respondent insists, and the Court below seem to have held, that, in determining the rights and liabilities inter se of these indorsers for the accommodation of the company, regard must be had, not to the contract in pursuance of which they became indorsers, but to the order of their indorsements, as evidencing the terms of their contract. That doctrine appears to their Lordships to be at variance with the principles of the English law. In a case like the present, the signing of their names on the note, by way of indorsement, in order to induce the bank to

discount it to the promissor, is not, as between the indorsers, *pars contractus*, but is merely the performance by them of an antecedent agreement. The terms of that previous contract must settle their liabilities inter se, irrespective altogether of the rules of the law-merchant, which will nevertheless be binding upon them in any question with parties to the note who were not likewise parties to the agreement. The law upon this point was correctly laid down by the Court of Common Pleas in *Reynolds v. Wheeler*, 10 C. B. (N. S.), 561."

The importance of the principles thus enunciated will excuse the length of the above extract; and it must be added that, referring to the cases in our own Courts of *Clipperton v. Spettigue*, 15 Gr. 269; *Cockburn v. Johnston*, 15 Gr. 577; *Janson v. Paxton*, 23 C. P. 439; *Fisken v. Meehan*, 40 U. C. R., 146, their Lordships observe that so far as they contain any dicta which seem to recognize the doctrine contended for by the respondent in this case, they cannot be accepted as conclusive of the law of England.

The next case requiring notice is *Ward v. National Bank of New Zealand*, p. 755.

## PRINCIPAL AND SURETY—CO-SURETIES IN SEVERALTY.

This case illustrates the relation of co-sureties in severalty between themselves and to their principal. The judgment shows the difference in this respect between the position of joint sureties and several sureties, thus: "A long series of cases has decided that a surety is discharged by a creditor dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety had guaranteed. In pursuance of this principle, it has been held that a surety is discharged by giving time to the principal, even though the surety may not be injured, and may even be benefited thereby. \* \* On the same principle it has been held that when the creditor releases one of two or more sureties

## RECENT ENGLISH DECISIONS.

who have contracted jointly and severally, the others are discharged, the joint suretyship of the others being part of the consideration of the contract of each. \* \* But where it is no part of the contract of the surety that other persons shall join in it, in other words, where he contracts only severally, the creditor does not break that contract by releasing another several surety; the surety cannot therefore claim to be released on the ground of breach of contract. It is true that he is entitled to contribution against other several sureties to the same extent as if they had been joint, but the right of contribution among such sureties depends not upon the contract, but on principles established by courts of equity. \* \* *The claim of a several surety to be released upon the creditor releasing another surety, arises not from the creditor having broken his contract, but from his having deprived the surety of his remedy for contribution in equity. The surety, therefore, in order to support his claim, must shew that he had a right to contribution, and that that right has been taken away or injuriously affected.*"

## BRITISH NORTH AMERICA ACT—ESCHEATS.

This valuable number of the appeal cases ends with the important Ontario Appeal of *The Attorney-General of Ontario v. Mercer*, p. 767, in which the question of the right to escheated lands in the Dominion is finally set at rest in favor of the Provinces, on the ground that such escheats come within the words "lands, mines, minerals, and royalties", reserved to the Provinces by sec. 109. It is unnecessary to follow out the minute reasoning by which this result is arrived at; but attention may be called to that passage in the judgment, at p. 779, where it is said: "Their Lordships are not now called upon to decide whether the word 'royalties' in sec. 109 of the B. N. A. Act of 1867, extends to other royal rights besides those connected with 'land,' 'mines,' and 'minerals.' The question is, whether it ought to be restrained to rights connected with mines and minerals

only, to the exclusion of royalties, such as escheats in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense. The larger interpretation (which they regard as, in itself, the more proper and natural) also seems to be that most consistent with the nature and general objects of this particular enactment, which certainly includes all other ordinary territorial revenues of the Crown arising within the respective Provinces."

The cases in the November numbers of the Q. B. D. and P. D. are few and can be noted very briefly.

The first one, *Webb v. Beawan*, 11 Q. B. D. 609, decides that words imputing that the plaintiff has been guilty of a criminal offence will support an action of slander, without special damage; and it is not necessary to allege in the statement of claim that they impute an indictable offence. The slanderous words as set out in the statement of claim demurred to, were: "I will lock you (meaning the plaintiff) up in Gloucester gaol next week. I know enough to put you (meaning the plaintiff) there." Which, said the pleader, meant, "that the plaintiff had been and was guilty of having committed some criminal offence or offences." Pollock, B., with whom Lopes, J., concurred, said: "The expression 'indictable offence' seems to have crept into the text books, but I think the passages in Comyns' Digest (tit. Action on the case for Defamation, D. 5 and 9) are conclusive to shew that words which impute any original offence are actionable per se. The distinction seems a rational one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporeally."

## MORTGAGE—ATTORNEY BY MORTGAGEE—DUTIES.

The only other case in this number requiring notice is *Kearsley v. Philips*, p. 621,

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[Co. Ct.

in which the full court held that if a mortgage is created by way of demise for a term of years, and the mortgagor attorns and becomes tenant to the mortgagee at a certain rent, the relation of a landlord and tenant is created, and upon failure to pay the rent the mortgagee is entitled to distrain the goods even of a stranger. "The decisive question in these cases," says Lindley, L. J., "is, whether there was a tenancy and not merely a personal contract on the part of the mortgagor."

The cases in the November number of the Probate Division all relate either to divorce or ecclesiastical law, and do not require notice here.

A. H. F. L.

## REPORTS.

### ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

#### COUNTY COURT OF THE COUNTY OF SIMCOE.

##### SOMERS V. KENNY.

*Revival of judgment—R. S. O. chap. 116—Duration of judgment—R. S. O. chap. 108—Imp. Act, 37 & 38 Vict., chap. 57.*

A judgment having been entered against both plaintiff and defendant, as co-sureties upon a promissory note, and the plaintiff in the original suit having since died, the now plaintiff having satisfied the judgment, applied for leave to revive the same, in the name of the deceased's administrators, and for an order for contribution against his co-surety, the present defendant. An order was made for the trial of an issue between the parties, questions both of law and fact being involved.

*Held*, that the proceedings were regularly taken, and that the judgment, if not barred by the statute, might be revived, either in the name of the administrator to the plaintiff in the original suit, or in the name of the present plaintiff himself (under R. S. O. c. 116).

*Held*, also, that the judgment referred to having been entered up on the 23rd May, 1865,

was barred by R. S. O. chap. 108, and the present application came too late.

*Held*, also, that *Allan v. McTavish*, 2 App. R. 278, and *Boice v. O'Loane*, 3 App. R. 167, were over-ruled by *Sutton v. Sutton*, L. R. 22 Ch. D. 511.

(Barrie, September 8, 1883.)

The facts, so far as material to the real points in issue, are set out in the judgment.

*Lount*, Q.C., for plaintiff.

*Pepler*, for defendant.

ARDAGH, CO. J.—On the 19th March last, in an action in this Court, in which one William Holt was plaintiff, and Samuel Palk, Thomas Kenny and Joseph Somers, were defendants, (the two last being the defendant and plaintiff, respectively, in the present proceeding), an application was made by the said Somers, as assignee of the judgment in the said action, for an order for leave to revive the action in the name of James Hay Campbell, the administrator, with the will annexed of the said Wm. Holt, deceased, and to issue execution against his co-defendant, Kenny.

It was thereupon ordered that the said defendants, Somers and Kenny, should proceed to the trial of an issue before a Judge, without a jury, in which issue, the said Somers was to be the plaintiff and the said Kenny was to be the defendant, and that the question to be tried should be whether the said Somers was entitled to proceed on the said judgment, by way of execution against the said Kenny for contribution, either by reviving the judgment in the name of the said J. H. Campbell, as administrator, or in his own name, or otherwise.

This issue was tried before me, without a jury, at the sitting of this Court in June last, and judgment was reserved.

(After setting out the facts and history of the case in full, the judgment proceeds.)

On the argument, Mr. Pepler, for the defendant, contended:

1st. That under *The Real Property Limitation Act*, R. S. O. chap. 108, sec. 23, plaintiff's right to recover is barred.

2nd. That there is no provision for a proceeding of this nature, inasmuch as the plaintiff (Holt) in the original suit, is dead, and his administrator is his only representative.

3rd. That this is a wholly unnecessary proceeding, as plaintiff, (assuming his right to enforce his claim against the defendant) might

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have issued execution on the judgment without taking the present steps.

As to the first objection : there is no doubt that if the judgments of the Court of Appeal in this Province, are to govern, the judgment in question is still in full force, notwithstanding the lapse of more than ten years since it was entered up.

It will help to have before us the decisions that have been given on this point, both in this country and in England, that we may see how the former are affected by the latter.

And first I may say that section 8 of the English Act (37-38 Vict., c. 57), corresponds in every material point, with sect. 23 of our own Act (R. S. O. chap. 108), excepting, of course, that "twelve years" in the former is "ten years" in our Act.

The latter reads : "No action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless," &c.

It will be borne in mind, too, that by the Act 24 Vict., c. 41, s. 10, it was enacted that "no judgment, rule, order, or decree for the payment of money of any Court of Upper Canada, shall create or operate as a lien or charge upon lands or any interest therein."

We come now to the cases decided in our own Courts.

(1). *Allan v. McTavish*, 41 U. C. R., 567, (June 1877) in which it was held by Morrison, J., that a covenant in a mortgage was good for ten years only.

This case was reversed on appeal (see below).

(2). *Caspar v. Keachie*, 41 U. C. R., 601 (Oct. 1877) in which it was held by Wilson, J., that a judgment is to be considered as "charged upon or payable out of land"; that a writ of revivor or suggestion is a "proceeding" under the Act, and that a judgment is valid for ten years only. *Watson v. Birch*, 15 Sim. 523, quoted.

(3). *Allan v. McTavish*, 2 App. R. 278, Jan. 3rd, 1878, (see above) in which the judgment of Court below was reversed; and held that a covenant in a mortgage was valid for 20 years. *Hunter v. Nockolds*, 1 Mac. & G. 640, followed.

(4). *Boice v. O'Loane*, 28 U. C. C. P. 506 (12th Feb., 1878), where Gwynne, J., held that the statute applied to all judgments, and that ten years was a bar. *Watson v. Birch*, (*supra*) approved of. *Hunter v. Nockolds*, (*supra*) not cited.

This case was also reversed on appeal, by (4) *Boice v. O'Loane*, 3 App. R. 167 (June 1878). Moss, C. J., approved of the reasoning of Gwynne, J., in the Court below, but said it was not consistent with *Hunter v. Nockolds*; which case was approved of and followed.

The only English cases I refer to, are,

(1). *Watson v. Birch*, 11 Jur. 195, S. C. 15 Sim. 523 (1874), deciding that all judgments came within the Act then in force, and not only such as affected land only. Followed by Gwynne, J., in *Boice v. O'Loane*.

(2). *Hunter v. Nockolds*, 1 Mac. & G. 640 : which decided that in actions upon covenant, or debt upon specialty, the limitation is 20 years. Approved of and followed in *Allan v. McTavish* and *Boice v. O'Loane*, both in appeal, (*supra*).

Since the decision in *Boice v. O'Loane* in our own Court of Appeal, two other cases have been decided in England :

(3). *Sutton v. Sutton*, L. R. 22 Ch. D. 511 (1882), in which it was held that the limitation of 12 years applied to the personal remedy on the covenant in a mortgage deed, as well as to the remedy against the land; and that the action (one on a covenant in a mortgage) was barred as well as regards the covenant, as the right to sue.

(4). *Fearnside v. Flint*, L. R. 22 Ch. D. 579, (1883). Here the mortgage debt was secured by a collateral bond, and it was held by Fry, J., following *Sutton v. Sutton* (*supra*) that no distinction existed between the covenant in the mortgage and the bond, and that the remedy on both was barred after twelve years.

The point raised in all these cases seems to be simply this : do the words "or otherwise charged upon, or payable out of any land," relate back to, and are they to be read in connection with, the previous words, "secured by any mortgage, judgment" (R. S. O. chap. 108, sec. 23).

If then it has been expressly decided that the personal remedy on the covenant in a mortgage is barred after the lapse of twelve (i.e. ten, in

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our Act) years ; or, what amounts to the same thing, that the words, "charged upon and payable out of land," do not relate back to the previous word "mortgage", does it not follow, by the same *ratio decidendi*, that they do not relate back to the word "judgment", and so that *every* judgment is barred by the lapse of ten years?

In *Sutton v. Sutton* (*supra*), at page 516, Jessell, M. R., after reading the section in question, says, "now the words that are material are, 'no action suit or other proceeding shall be brought to recover any sum of money secured by any mortgage.' It is impossible to say that those words do not include this sum of money. It is a sum of money secured by a mortgage. Those who say that these words are not to be read literally must shew some reason why they should not. What they say is that it does not mean to recover any sum of money secured by a mortgage, but that it means to recover the money so far as it can be recovered by a sale of the land, or by the receipt of the rents : that is to say, so far as you can get it out of the land. That construction puts words there which are not to be found in the section. . . . But . . . when you consider that a proceeding at law is an action, and a proceeding in equity is called a suit, and when you get the two words 'action' and 'suit' together, it is plain to my mind that those who framed that section meant any proceeding in which any sum of money secured by a mortgage might be recovered. . . . The principle on which the law has always been based is either actual satisfaction, or presumed satisfaction, or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay. It seems absurd that you should get rid of the greater, so to speak, namely, the security upon the land, and should nevertheless retain the lesser, namely, the personal liability to pay. The result to my mind, would be too absurd. It is not a decisive or conclusive reason, but it is a reason."

In *Boice v. O'Loane*, Moss, C.J., takes a different view ; at page 172, after referring to 24 Vict., c. 41, (enacting that no judgment should create a lien or charge upon lands) and Con. Stat., ch. 88, in which the same language is used, he goes on to say, "The suggestion therefore is that the section shall be read thus : 'no

action shall be brought to recover any sum of money secured by any mortgage, or any sum of money secured by any lien, or otherwise charged upon or payable out of any land.' I cannot assent to that construction of the statute. It is in conflict with the decision in *Allan v. McTavish*, because if the effect of that construction is to limit the period of recovery in an action at law upon a judgment to ten years, it should have the same effect upon a mortgage."

We must therefore come to the conclusion that looking at the decisions in our own Court of Appeal (the point has not yet been raised before the Supreme Court), the law in this Province is that this judgment is still in force, inasmuch as 20 years have not elapsed since its recovery. [The learned judge then went on to speak as though *Sutton v. Sutton* (*supra*) was a judgment of a Divisional Court in which case it would not be binding on him, in the face of the judgments to the contrary in our Court of Appeal, but his attention being directed to the fact that *Sutton v. Sutton* was a decision of the Court of Appeal in England, he went on to say,] As *Sutton v. Sutton* is a decision of the Court of Appeal at home (and I find it is on referring to it again), I think it ought to be binding on me. I am under the impression (whether rightly or wrongly I cannot say positively as I have no means of informing myself on the point), that if either *Allan v. McTavish*, or *Boice v. O'Loane* were now to be brought before the Supreme Court here that Court would feel itself bound to override them, and follow *Sutton v. Sutton*. I think also that if the judgment I now give (holding that the judgment in *Holt v. Palk et al.* is barred by the lapse of ten years) be appealed from, that the Court of Appeal would follow *Sutton v. Sutton*, and not deem itself bound by its previous judgments in *Allan v. McTavish* and *Boice v. O'Loane*. That being my opinion, it would be putting the parties to needless expense, it seems to me, to refrain from giving now the judgment which I think the defendant would ultimately be entitled to.

Now as to the next objection, that there is no provision for a proceeding of this sort.

In *Smith v. Burns*, 30 U. C. R. p. 630, Cameron, J., remarks :—"If, therefore, the judgment in question could be properly revived in the name of the administrator, as to which, no ex-

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ception having been taken to the writ of revivor on that ground, I express no opinion," &c.

This remark may throw some doubt on the proper practice to be pursued in such a case as this. I am unable to see, however, how this objection ought to have any weight. The plaintiff here is assignee of the original judgment. He is one who comes within the 2nd section of "The Mercantile Amendment Act," (R. S. O. chap. 116), as a person who being liable with another for any debt or duty, "and having paid such debt," is "entitled to have assigned to him every judgment . . . held by the creditor in respect of such debt." The judgment, then, having been assigned to the plaintiff on his satisfying the debt of the creditor, sec. 3 enacts that "such person shall be entitled to stand in the place of the creditor and to use all the remedies, and if need be . . . to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from . . . any co-surety indemnification," &c.

If the judgment were still in force, the original creditor, if alive, might, if still the holder of the judgment, take steps to revive it, should the lapse of time render such a step necessary. In his lifetime, too, his assignee (the present plaintiff) might take the same step. But as the original creditor is dead, his assignee is desirous of reviving the judgment by reason of the death of one of the parties, and he proceeds to call upon the administrator, the only legal personal representative of the deceased creditor, and upon his (the assignee's) co-surety, to shew cause why the judgment should not be revived. The administrator has no cause to shew, or, rather, does not appear to shew any cause. What is there to prevent the judgment being revived, if necessary, in the name of the administrator, who makes no objection—of course on proper indemnity being given—or even in the name of this plaintiff himself. It does appear from the 6th section of the last mentioned Act (R. S. O. chap. 116), coupled with the general tenor of the A. J. Act and the Ont. Jud. Act, that such an order in the last alternative might properly be granted.

As to the 3rd objection, that this is an unnecessary proceeding and that plaintiff might have issued execution on the judgment without taking the present steps.

I think it is rather late for the defendant to take this objection. On the return of the summons, inasmuch as certain facts were in dispute and could not be agreed upon, and it seemed inadvisable to try these facts upon affidavits, and moreover, the question being one of mixed law and fact, it was proposed by one of the parties and assented to by the other, that an issue should be directed to be tried, without a jury, when the whole question could be more satisfactorily disposed of. The defendant then being an assenting party to this proceeding, ought not to be heard now, when he says it was unnecessary.

The defendant refers to *Beminger v. Thrasher*, 9 P. R. 206 (affirmed in 1 Ont. R. 313), establishing that where an execution was issued and returned within six years after judgment entered, there was no necessity for a *sci. fa.*, or writ of *revivor*. See also, *Johnson v. Wilkinson*, 3 P. R. 229, and *Jenkins v. Kirby*, C. L. J., 164.

This of course was during the lives of the parties; but could execution issue after the death of either party? I think not.

The case of *Holmes v. Newlands*, 5 U. C. R. 367 and 634, lays it down that even though plaintiff has issued execution within the six years, it does not prevent him from proceeding by *sci. fa.*

The result of this whole proceeding then will be that no order shall be made to revive the judgment in question, and that the plaintiff pay all the costs occasioned by his application.

### THIRD DIVISION COURT, LEEDS AND GRENVILLE.

CONNERS V. BIRMINGHAM.

*Division Courts—O. J. A., Rule 80.*

*Held*, that the provisions of marginal Rule 80 of the Judicature Act apply to a Division Court cause.

Action upon a promissory note made by defendant in favor of one C. W. Taylor, and endorsed by Taylor, who was not sued.

Notice of defence disputing plaintiff's claim in full.

*W. B. Carroll* moved, upon notice, for an order under marginal Rule 80 of the Judicature

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Act, to sign final judgment. He filed affidavit of plaintiff, and cited section 77 of the Judicature Act.

*W. H. Jones* showed cause, contending that the County Judge has no jurisdiction to take such a matter in the Division Court.

**MCDONALD, Co. J.**—In my judgment the provisions of the Judicature Act extend to any Division Court matter in which the machinery of that Court will enable effect to be given to them. The order allowing plaintiff to sign final judgment for the amount of his claim and costs will go—with permission to him to issue immediate execution upon such judgment.

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PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

#### COURT OF APPEAL.

[Dec. 11, 1883.]

##### COURT V. WALSH.

##### *Mortgage—Insolvency—Limitations.*

*Held*, affirming the judgment of *Boyd, C.* in 1 O. R., 167, *Spragge, C. J. O.*, dissenting, that the fact of a mortgagor becoming insolvent and an assignee in insolvency having been appointed, does not stay or suspend the running of the Statute of Limitations, so as to keep alive the claim of the mortgagee.

*Bethune, Q.C.*, and *Clute*, for the appellant.

*MacLennan, Q.C.*, and *Biggar*, for respondent.

##### VANVELSOR V. HUGHSON.

The judgment of the court below (reported 45 U. C. R., 252) was affirmed, without costs, the plaintiffs having failed at the first hearing of the case to prove a link in the title set up by them, but which they subsequently established.

*Robinson, Q.C.*, for appellant.

*C. R. Atkinson*, for respondent.

##### THOMPSON V. TORRANCE.

An appeal against the decree of the Court of Chancery pronounced by *Blake, V. C.* (28 Gr. 253), dismissed with costs, there being an equal division of this court on the effect of the evidence adduced in the case.

*Robinson, Q.C.*, for appellant.

*McCarthy, Q.C.*, *Mortimer Clark* and *W. Cassels*, for respondent.

##### KEEFER V. MCKAY.

The court being equally divided as to the proper construction of the will and Act of Parliament in this case set out 29 Gr. 162, the appeal against the judgment there reported was dismissed with costs.

*Bethune, Q.C.*, and *Ormully*, for the appellant.

*MacLennan, Q.C.*, *S. H. Blake, Q.C.*, *Black* and *Plumb*, for other parties.

##### PROVINCIAL INSURANCE CO. V. WORTS.

An appeal from the judgment of the Court of Common Pleas (31 C. P., 523) was dismissed with costs, in consequence of an equal division of the members of the Court of Appeal.

*Bethune, Q.C.*, *S. H. Blake, Q.C.*, and *Biggar*, for appellants.

*Robinson, Q.C.*, and *H. W. Murray*, for respondents.

##### FULTON V. U. C. FURNITURE CO.

##### *Contract by letter.*

"In order to convert a proposal into a promise, the acceptance must be absolute and unqualified." When therefore the plaintiffs had agreed to supply the defendants with 100,000 feet of lumber subject to inspection, the defendants in a subsequent letter assumed that this was to be "American inspection," and the plaintiffs answered, "We do not know anything about American inspection, but will submit to any reasonable inspection," and no formal waiver of the inspection claimed by the defendants was made, neither was there any agreement by the plaintiffs to submit to such inspection:

*Held* (reversing the judgment of the court below, 32 U. C. C. P. 422), that there had not been shewn "a clear accession on both sides to one and the same set of terms," and that a concluded and binding agreement had not been made out between the parties.

*Robinson, Q.C.*, and *Crothers*, for appeal.

*F. Hodgins*, contra.

## SOUTHAM V. NORCOMBE.

*Married woman—Separate estate.*

The defendant, a married woman, entitled to dower out of the estate of a former husband, but which had not been set out, she residing on the lands for upwards of sixteen years, indorsed a note for the accommodation of her son, and on being sued thereon, she objected that, having been an accommodation indorser only she was not liable, and a verdict having been rendered against her, she moved the Judge for a new trial, alleging also want of notice of dishonor. The Judge refused the application, and on appeal to this court this ruling of the Judge was affirmed and the appeal dismissed with costs, the production of the protest for non-payment being sufficient *prima facie* evidence of the notice of dishonor, and there being no merits in the other defence sought to be raised.

*R. Meredith*, for appeal.

*C. Ferguson*, contra.

## CROSSFIELD V. GOULD.

*Specific performance—Time of essence of the contract.*

The defendant agreed to sell to the plaintiffs certain timber limits, for \$25,000, stipulating that they should have a certain named time to inspect the property and arrange for payment of the price. Subsequently, and on the 20th August, the plaintiffs wrote excusing themselves for not having carried out the purchase and asking for an extension of time, for their accepting or refusing "your limits one or two weeks—two weeks if possible", such full further time so asked falling on the 10th of September, and the defendant granted such extension of time to make their financial arrangements only. The plaintiffs failed to complete the purchase at the time named, and the defendant sold to the other defendant, Miller.

*Held*, affirming the judgment of Boyd, C., that looking at the subject of this contract, and express limitation of time between the parties, although time was not originally of the essence of the contract, their correspondence subsequently had shewn it to have been made so, and therefore that the plaintiffs were not entitled to a specific performance of the contract.

*Moss*, Q.C., and *Miller*, for the appellants.

*S. H. Blake*, Q.C., and *W. Cassels*, for respondent Gould

*Osler*, Q.C., and *Creelman*, for respondent Miller.

## CHAMBERLIN V. CLARK.

*Administration.*

*Held*, affirming the judgment of the court below (1 O. R. 135) that where in the administration of an estate an executor pays some creditors, leaving others unpaid, and the estate proves deficient, the creditors are liable, at the suit of an unpaid creditor, to be called upon to refund in order to a *pro rata* distribution of the estate.

*Moss*, Q.C., for the appellant.

*S. H. Blake*, Q.C., for respondent.

## HARVEY V. HARVEY.

*Sci. fa.—Irregular judgment—Fraudulent judgment—Collusive judgment.*

In a proceeding by *sci. fa.* to enforce payment of calls upon stock by a shareholder. *Held*, Burton, J. A., dissenting, that he may set up as a defence irregularities in the recovery of judgment against the Company, and he is not bound to move to set such judgment aside.

Per Burton, J. A.—If the judgment is only irregular, the shareholder must move to set it aside, and he cannot raise the question by the pleadings: but where the judgment has been obtained by collusion or fraud, he may adopt either mode of defence.

*McCarthy*, Q.C., and *Bruce*, for the appeal.

*Robinson*, Q.C., and *E. Martin*, Q.C., contra.

## QUEEN'S BENCH DIVISION.

## EDGAR V. NORTHERN RAILWAY CO.

*Negligence—Contributory negligence.*

The plaintiffs, husband and wife, were on train going to Lefroy. Conductor before reaching the station, announced that the next station was Lefroy, knowing that there were passengers for that place. On approaching station he slowed train, but did not stop. Husband sprang

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while train moving slowly and wife sprang after him and was injured. Left to jury to say whether she had acted imprudently in so doing. They found verdict for plaintiffs.

*Held*, that question of contributory negligence was properly left to them and court refused to disturb the verdict.

#### BUTTERFIELD V. WELLS.

*Solicitor and client—Retainer by assignee under Insolvent Act of 1875—Liability of assignee for costs.*

The defendant's testator was a sheriff and official assignee under Insolvent Act of 1875. The plaintiff was solicitor for the City Bank, and also for one Boupon, whose petition, G. F., was placed in insolvency. The official assignee became creditors' assignee. At first meeting of creditors, B. being chairman, the plaintiff representing the City Bank, whose claim amounted to nearly the whole indebtedness, moved a resolution whereby it was resolved to sell certain goods of the insolvent, that the assignee should take the necessary proceedings to realize the object and recover certain property alleged to belong to the insolvent, and for that purpose to retain counsel if necessary. W. became inspector of the estate and consulted with the plaintiff, and on his advice instructed the assignee to defend and bring actions. The assignee was obliged to pay costs and damages in action brought against him to recover goods wrongfully taken by him, and he also paid the plaintiff some costs, whereby the assets of the estate were exhausted, and a small sum in addition paid by the assignee out of his own funds. The defendant's testator was subsequently removed from office of assignee and a new assignee appointed, wherefore he presented a petition to the Insolvent Court, in which he alleged that he had retained the plaintiff and had been put to great expense in bringing and defending suits as assignee, and had become liable to pay large sums of money in respect thereof, and prayed payment by the new assignee, which was refused. The plaintiff delivered his bills to the defendant's testator in his lifetime; after death of testator, plaintiff wrote a letter to one of his sons about the costs, in which in relating the facts, he stated that he was attorney for the bank. The plaintiff now sued the personal representative for his unpaid

costs of the proceedings carried on by him. Senkler, Co. J., who tried the case, found that the retainer was not a personal one by the assignee, but that the plaintiff had acted for the benefit of the creditors and was in fact their solicitor.

*Held*, ARMOUR, J., dissenting, (affirming the judgment of Senkler, Co. J.) it was a question to be determined on the evidence, whether the retainer was a personal one by the assignee, or whether he was acting merely on the instructions of creditors; that upon the evidence the plaintiff was solicitor for the creditors and not for the assignee personally, and notwithstanding the admission contained in the assignee's petition, he had not incurred any personal liability for the costs.

Per ARMOUR, J.—The presumption is that when a solicitor is retained, the person retaining him is liable for his costs, and to avoid liability he must shew some special agreement to the contrary. The evidence here not only did not displace the presumption, but shewed that the testator had always considered himself liable for the costs.

Per HAGARTY, C. J.—It is the duty of a solicitor to inform his client as to the advisability of taking proceedings and incurring costs, when it may become a question whether the costs will have to be paid out of his private funds or out of a trust fund or estate.

#### REGINA V. WALLACE.

*Canada Temperance Act of 1878—Conviction—Certiorari—Prior conviction.*

*Held*, CAMERON, J., dissenting, that section 111 of Can. Tem. Act '78 takes away the right to certiorari in all cases except cases of want or excess of jurisdiction, and that it applies to conviction for all offences against the preceding sections of Pt. II of the Act and does not relate to merely offences against sec. 110.

Per HAGARTY, C. J., and ARMOUR, J.—An erroneous finding on the evidence by the magistrate is not such a want of jurisdiction as warrants the issue of a certiorari.

Per CAMERON, J.—There was no evidence of the commission of the offence charged in this case and therefore the magistrate acted without jurisdiction, and a certiorari would lie.

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Per ARMOUR, J.—The omission of the magistrate to ask the accused whether he had been previously convicted did not deprive him of jurisdiction to receive proof of the prior conviction.

The allegation in the conviction that the offence was committed between 30th June and 31st July was a sufficiently certain statement of the time.

#### LEVAGE V. MIDLAND RAILWAY CO.

*Railway Co.—Train moving backwards—Negligence.*

The defendants were required by law to station a man on the last car of every train moving reversely in any town, to warn persons standing on or crossing the track of the approach of the train.

*Held*, that defendants did not comply with the direction by having a man at the front end of the last car where he could see persons crossing the track.

In this case there was no brake at the rear end of the last car, the brakeman on last car seeing the track clear a few minutes before the accident, went to the front end, and plaintiff attempting to cross was injured.

*Held*, evidence of negligence to go to the jury.

#### WATERLOO MUTUAL INS. CO. V. ROBINSON.

*Evidence—Collateral matters—Admissibility of—Pleading—Silence of party as to material fact alleged by opposite party.*

In an action in a bond against two sureties, the defendant R. set up the defence and gave evidence that his signature to the bond had been obtained by fraud; the evidence of his co-defendant C. was tendered for the purpose of showing that C.'s signature to the bond had also been so obtained, which was rejected as inadmissible.

*Held*, that evidence of C. was admissible, as showing a fraud practised on him with respect to the same instrument by the same person, and at or about the same time as the alleged fraud on R., and because it was confirmatory of R.'s evidence, and a new trial was ordered.

Per ARMOUR, J.—Where a material fact is

alleged in a pleading and the pleading of opposite party is silent with respect thereto, the fact must be considered as in issue. Therefore it was competent for C. to deny the execution of the bond, his pleading not expressly admitting it.

*W. H. Bowlby*, for the plaintiff.

*R. M. Meredith*, for defendant.

#### LIGHTBOURNE V. WARNOCK.

*Principal and surety—Promise in writing—Sufficiency of.*

F. being indebted to the plaintiffs who were pressing him for payment, the defendant signed the following document and delivered it to the plaintiffs in consideration of their giving time to F.: "I will guarantee that the security offered by Mr. John Fleming for the balance of your account will be executed and forwarded within 10 days." The security referred to was a mortgage upon real estate to be executed and a paid-up life policy for \$5000, which F. had agreed verbally to give to the plaintiffs, neither of which existed at the time of F.'s agreement or the defendant's guaranty. F. never gave security, and the plaintiffs by refraining from suing him lost their debt.

*Held*, affirming the judgment of BURTON, J.A., HAGARTY, C. J., dissenting, that the writing signed by the defendant was not sufficient to satisfy the 4th section of the Statute of Frauds, which regarded as an original promise or a guarantee.

Per HAGARTY, C. J. The guarantee is divisible and the writing was not sufficient as to the mortgage of real estate, because the promise of the debtor himself was not enforceable against him, not being in writing, but as to the policy the writing was sufficient.

*Osler*, Q. C., for the appeal.

*Mackelcan*, Q. C., contra.

#### REGINA V. BERRIMAN.

*Lord's Day Act—The Public Service.*

*Held*, that the R. S. O., cap. 189, which forbids the profanation of the Lord's Day by persons carrying on their ordinary business, does not apply to persons in the service of Her Majesty, and therefore conviction of a lock tender on the Welland Canal for locking a ves-

sel through the canal on Sunday in obedience to the orders of his superior was quashed.

*H. J. Scott*, for the defendant.

*J. R. Cartwright*, for the Crown.

*McClive*, for the private prosecutor.

#### IN RE CLARKE V. McDONALD.

*Division Courts Act—Garnishee proceedings—Notice disputing jurisdiction filed too late—Prohibition—High Court procedure.*

*Held*, affirming the judgment of Armour, J., that where a garnishee does not file a notice disputing the jurisdiction of a Division Court within the time required by 43 Vic., ch. 8, sec. 14, though no objection can be taken to the jurisdiction of the Division Court in that Court, the jurisdiction of the H. C. J. to prohibit the proceedings is not ousted.

The garnishees, though partners, resided in different places, out of the jurisdiction of the Division Court, and but one of them was served. No order was made dispensing with service in the other. The learned Division Court Judge gave judgment against both in their absence.

Per ARMOUR, J., the prohibition might be supported on this ground; also R. S. O. cap. 47, sec. 134, construed.

The Judicature Act does not apply to a case of this kind, the proceedings of which are specially provided for in the Division Courts Act.

*Lask*, Q.C., for the appellant.

*Aylesworth*, contra.

#### COMMON PLEAS DIVISION.

DIVISIONAL COURT.—DEC 24.

#### RE MEEK V. SCOBLE.

*Division Courts—Claim for damages and debt—Damages above jurisdiction—General abandonment—Prohibition.*

The plaintiff sued in the Division Court on a claim which was originally composed of a solicitor's bill of costs, \$36.06; damages, \$69.33; due for advice, \$6; total, \$111.39. The plaintiff at the trial abandoned as to \$111.39, without specifying from what items he threw the amount off. The learned Judge at the trial reduced the

\$69.33 to \$62, the \$6 item was struck out; and the total then stood \$92.33.

*Held*, that the abandonment being general, it could not be assumed that the plaintiff had reduced his demand for damages so as to give the court jurisdiction, and a prohibition was ordered.

*Meek*, for the plaintiff.

*A. C. Galt*, contra.

#### OATES V. INDEPENDENT ORDER OF FORRESTERS.

*Insurance—Suspended Court—R. S. O., ch. 167, sec. 11—Exhausting means of redress in order—Amendment—Pleading—Leaving County without permit.*

One O. was a member of Court Maple of the Independent Order of Forresters, and under the endowment provisions was insured in the Order for \$1000. This Court left the Order in a body, and joined another Order called the Canadian Order of Forresters, and the Court was in consequence suspended. Part of the agreement of joining the Canadian Order was that O., who was in ill-health and had gone to California for change, should be taken and insured with the others. By the rules it was provided that members of suspended Courts, who were in good standing at suspension, should, on application within 30 days to the Supreme Secretary, and payment of a fee of \$1, receive a card of membership, and be entitled to the endowments, provided they paid all assessments as they fell due, and affiliated with another Order; but if after 30 days, they must pass a medical examination. O. on returning from California, being then in good standing, on ascertaining that the Court Maple had been suspended, and within the 30 days thereof, applied to the Supreme Secretary of the Independent Order for a card, tendering \$1, and he also tendered all assessments due, but the card was refused unless he obtained a medical officer's certificate; he also endeavoured to affiliate with another Court, but was prevented doing so by reason of his not having a card. By the certificate of endorsement the \$1000 was payable to the widow, orphans, or legal heirs of O.; and by endorsement thereon by O. he directed the amount to be paid to the plaintiff, the widow.

*Held*, under the directions so given, as well

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as under the statute R. S. O., ch. 167, sec. 11, the widow was entitled to recover the amount; and that the fact of O. being a member of another Order, did not, *ipso facto*, deprive him of his rights and membership of defendants Order. It was objected that O. had not appealed through all the courts and functionaries of the Order against the refusal to give him the Supreme Court card; but *held*, that the evidence disproved this.

At the trial an amendment was asked for, to set up a forfeiture of the policy, by reason of O. going to California without a permit, which was refused.

*Held*, under the circumstances, that the refusal was proper.

*Quare*, whether the way, cause and manner, in and for which O. and the other members of Court Maple left it, and joined in a body another rival order, might not, if properly pleaded, have required some consideration.

The frame and effect of the pleadings in this case considered.

*R. M. Meredith*, for the plaintiff.

*Osler*, Q.C., for the defendant.

#### NOLAN V. DONELLY.

*Goods, description of—Bills of sale act—Sufficiency.*

In an assignment for the benefit of creditors, the description of the goods and chattels of the assignors was as follows: "All and singular the personal estate and effects, stock-in-trade, goods, chattels, rights and credits, fixtures, book debts, etc., and all other the personal estate and effects whatsoever and wheresoever, and whether upon the premises where said debtors' business is carried on or elsewhere, and which the said debtors' business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatsoever, including among other things, all the stock-in-trade, goods and chattels which they now have in their store and dwellings in the village of Renfrew aforesaid: also all and singular their personal estate and effects of every kind and nature, etc.

*Held*, that this was not a sufficient description of the assignors' goods within the meaning of the Bills of Sale and Chattel Mortgage Act.

*Delamere*, for the plaintiff.

*Moss*, Q.C., for the defendant.

#### PATT. RSON V. MCKELLAR (SHERIFF).

*Fi. fa. goods—Delivering to sheriff—Sale by execution debtor thereafter—Right of sheriff to goods.*

The defendant, the Sheriff of Wentworth, received two executions against one M.'s goods, namely, on the 18th January and 15th February respectively. The sheriff made a formal seizure on the delivery of the first writ, but left no one in possession, and the execution debtor remained in possession and carried on his business as before the seizure, because, as he said, he had the undertaking of the manager of a bank, interested as creditors in the goods, for their safe custody. There had been a stay upon the first execution, which was withdrawn on the delivery of the second one, and the sheriff directed to proceed. On the 6th March the goods were sold by the execution debtor, in connection with the bank, to the plaintiff, who removed them to his own place of business. On the 22nd March the sheriff seized all the goods then in plaintiff's possession which he had received from the execution debtor, as also certain goods of the plaintiff which he claimed to take in lieu of goods received from the execution debtor and sold by plaintiff. The sale to the plaintiff was found to be *bona fide* and for value, and without notice of the executions. In replevin for the goods.

*Held*, WILSON, C. J., dissenting, that the sheriff was entitled to the goods of the execution debtor then in plaintiff's possession; but not to the goods of the plaintiff's taken by the sheriff in lieu of those sold by the plaintiff.

On the sheriff making his seizure on the 22nd March, the plaintiff gave him an undertaking to answer for all goods sold by him thereafter, if the sheriff should be held entitled to the goods,

*Held*, under a counter claim setting up this undertaking, the sheriff was entitled to recover the value of the goods sold by the plaintiff after the 22nd March, and before the issue of the writ of replevin.

*E. Martin*, Q.C., for the plaintiff.

*Osler*, Q.C., for the defendant.

Chy. Div.]

NOTES OF CANADIAN CASES.

[Prac.]

## CHANCERY DIVISION.

Proudfoot, J.]

[Nov. 23.]

CLARKE V. THE UNION FIRE INSURANCE  
COMPANY.

## MCPHEE'S CLAIM.

*Joint contract—Insurance—New contract by  
one of two joint contractors—R. S. O., c. 160,  
secs. 21, 22.*

James McPhee and Fanny McPhee jointly insured in the defendants' Company. The Company afterwards went into liquidation, and a Receiver was appointed by the Court, who, on January 10th, advertised for policy holders to file their claims before February 15th. On February 4th an agent of the Company procured James McPhee, but without the assent or concurrence of his wife, to sign and send to the Receiver a claim for rebate for unearned premium, under the statutory provisions, R. S. O., c. 160, secs. 21, 22, which claim was received by the Receiver on February 7th. The property insured was burnt down on February 24th. On February 27th a circular was sent to James McPhee by the Receiver, notifying the policy holders and all entitled to claim against the Government deposit, under R. S. O., ch. 160, of an agreement for re-insurance of outstanding risks with other Companies, and the policy holders were notified if they objected to such re insurance and desired to claim for rebate of premium, they were to send in their claim on or before March 15th. No acknowledgment of the receipt of James McPhee's claim for rebate had been sent to him. On March 3rd the Receiver received the regular notice of loss by fire, and on March 14th the claim papers; all before the expiration of the time limited by the said circular.

*Held*, on petition by way of appeal from the Master in Ordinary, that neither James McPhee nor Fanny McPhee were bound by the former's claim for rebate. The act relied on was not a release, it was an attempt to exercise a statutory power, which failed; or an attempt to make a new contract, which was not authorized by one of the parties, and was not accepted by the Receiver before the loss occurred.

Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one, will prejudice the right of the other, as here an agreement to substitute a claim for rebate in lieu of the right under the policy.

*A. C. Galt*, for the petitioners.*W. A. Foster*, for the plaintiff.*Bain, Q.C.*, for the defendants.

## PRACTICE.

Rose, J.]

[Dec. 31, 1883.]

FORFAR V. CLIMIE.

*Prohibition—Division Court—Jurisdiction—  
Order for Goods.*

Motion for prohibition.

An action was brought in a Division Court upon the following order:

"Mr. Thos. Forfar.—Please ship us your old boiler and engine, to be in good shape, to our address, not later than June 7th, 1883, for the sum of \$115 and shafting.—G. Climie & Son."

*Held*, that this order did not ascertain the amount due in such a way as to bring it within the increased jurisdiction of the Division Court.

*Wiltzie v. Ward*, 9 P. R. 216, followed.

Prohibition granted.

*Staunton* for the motion.*Sadleir, Q.C.*, *contra*.

## LAW STUDENT'S DEPARTMENT.

We have from time to time published the questions given at the examination of the Law Society. The Benchers have recognized the value of our action by requesting us to continue their publication in a regular and complete manner. We gladly comply, and begin with this issue.

## FIRST INTERMEDIATE.

*Equity.*

1. Write a note upon the maxim that equity will not suffer a right to be without a remedy.
2. A lessee covenants in his lease to keep the

## EXAMINATION PAPERS.

demised premises in repair during the term of the lease, but without any fault on his part the property is destroyed by fire. Will he be liable on his covenant? Give reasons.

3. A. is the owner of a piece of land and agrees to sell it to B. for a price named. From independent inquiries made before the time of the contract, B. believes there are 100 acres, while A. knows, and the fact is, that there are only 75 acres. After payment of the purchase money B. discovers his error and brings action to rescind the contract on the ground of mistake. What are the rights of the parties? Explain.

4. A post-nuptial settlement of the husband's property is upon its face expressed to be made in pursuance of ante-nuptial marriage articles, but by mistake an estate in fee is thereby conferred upon the wife instead of an estate tail, as provided for by the articles. Can the husband obtain any relief? Explain.

5. A. is the owner of a piece of land, and B. is mortgagee thereof. The owner procures the mortgagee to execute a discharge of the mortgage upon the representation that it will be paid off in a few days. The owner thereupon registers the discharge and sells the land to C., who has no notice that the mortgage has not been paid off. B. brings action for foreclosure, which C. defends. What are the rights of the parties? Explain.

6. With regard to voluntary trusts, what distinction does equity draw between enforcing trusts executed and trusts executory?

7. A testator makes a bequest for charity to such persons as he shall afterwards name as executors. He dies without having named any executor. Will the bequest be valid? Explain.

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*Real Property.*

1. Explain what is meant by *tenure*; and state the effect of the Statute of *Quia Emptores* upon the doctrine of tenures.

2. Define *primogeniture*. Is the law of primogeniture in force in Ontario? Can the owner of an estate prevent the operation of the law of primogeniture, and if so, how?

3. On the death intestate of a tenant in tail, how does the estate descend? Why?

4. What is the earliest form of conveyance of land mentioned by Mr. Williams?

5. What was the origin of *Uses*? Explain the intention and effect of the Statute of *Uses*.

6. How long a period of time is allowed for the registration of a will? What is the effect of non-registry within the time allowed?

7. Name and explain the three kinds of incorporeal hereditaments.

*Anson on Contracts and Statutes.*

1. Give examples under the rule that Courts of Law hold a consideration to be unreal if it be impossible upon the face of it, or so vague in its terms as to be practically impossible to enforce.

2. Give the distinction drawn by Anson between Fraud and Misrepresentation.

3. Give examples of contracts void as tending to encourage litigation.

4. Give common rule as to the assignment of *rights* and *liabilities* under a contract. How has the common law rule been affected by statute?

5. Give exceptions to the rule that verbal evidence cannot be admitted to vary the written record of a contract.

6. What is the statutory consequence of an endorser of a promissory note failing to write his address after his name on the note?

7. State in general terms the cases in which the remedy of specific performance of a contract will not lie.

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*Anson on Contracts and Statutes.*

*(Honors.)*

1. Discuss the proposition that an offer need not be made to an ascertained person in order that it may be binding.

2. Point out any difference between the note or memorandum in writing which will be sufficient to satisfy the 17th section of the Statute of Frauds, and that which will be sufficient under the 4th section.

3. To what extent is a purchaser of goods who is unable to inspect the thing purchased, protected by operation of law from mistakes as to the quality of the thing purchased? Answer fully.

4. Give a short history of the law respecting wagering contracts.

5. Distinguish between the words "void," "voidable," and "unenforceable," as applied to contracts, giving an example of each kind.

6. What rights are conferred on the assignee by the assignment of a bill of lading. Distinguish in your answer between Common Law and Statutory Rights.

7. Write short notes on the difference between Courts of law and equity, as to construction of terms of contracts respecting time and penalties. Give effect of any statute law on the subject.

## EXAMINATION PAPERS.

*Real Property.**(Honors.)*

1. What is the effect of a conveyance to A. and B. (husband and wife), and C., a third person, and their heirs "as joint tenants"?
2. A devisee of lands finding that the devise is a burdensome one, will not take the estate, and disclaims, whereby the lands descend to the heir, can the heir disclaim?
3. Explain the rule in *Shelley's Case*, and illustrate your answer by an example.
4. Explain *merger*.
5. How must the witnesses to a will subscribe their names in order to make the execution of the will valid?
6. A grant is made to A. for life, and if C. be living at his decease then to B. in fee. What interest or estate, if any, does B. take? Explain.
7. What is the protector of the settlement? How many persons may be constituted protectors at the same time? How must the protector's consent to a disentailing deed be given?

*Smith's Common Law.**(Honors.)*

1. Explain the meaning of *retainer* and *re-miller*.
2. After goods have been refused at the consignee's address, what is the responsibility of the carrier in respect of them?
3. Who owns the tree in each of the following cases? (1) The trunk and all the roots are on the land of A., but all the branches hang entirely over the land of B. (2) The trunk is on the land of A., but all the roots are in the land of B.
4. What implied warranties are there on the part of the owner of a vessel who holds a policy of insurance upon it? Explain fully the meaning and effect of such warranties.
5. What effect has excess of authority by an agent upon the liability of the principal to third parties (1) in the case of a particular agent, (2) in the case of a general agent?
6. Explain the meaning of *general average* and *salvage*.
7. Where the tenant of a dwelling-house has covenanted to repair, and the house is burnt down during the term, what is the tenant's position (1) as to liability to rebuild, (2) as to liability for the rent while deprived of the use of the house?

*Williams on Personal Property and Judicature Act.*

1. Define Bailment.
2. Define Charter Party, Bill of Lading and Freight. In case of the mortgage of a ship, who is entitled to the freight?
3. Point out the ways in which a surety may be discharged from his liabilities by the conduct of the creditor.
4. What was the distinction anciently drawn between a gift of goods to A. for life and after his decease to B., and a gift of the *use* or *enjoyment* of the goods to A. for life, and after his death, to B.? State the law on the subject as it now stands.
5. Can a voluntary settlement of personal estate be defeated by a subsequent sale of the property by the settor? Give reason for your answer.
6. Give the names of the ordinary pleadings in an action. State the times for delivery of each and shortly how the issues to be raised by the same are to be tried.
7. What are the liabilities of an executor in case of recovery against him on a debt of his testator which was barred by the Statute of Limitations.

## SECOND INTERMEDIATE.

*Broom's Common Law and O'Sullivan's Manual of Government in Canada.*

1. What is the primary or "golden" rule to be observed in the interpretation of statutes?
2. Explain the meaning of *general customs* and *particular customs*; and mention the principal qualities which customs must possess in order to be binding.
3. Explain the meaning of *damnum sine injuria*, and *injuria sine damno*. Give an example of each.
4. What is the principal difference between a *tort* and a *crime*?
5. Explain the meaning of *independent covenants*, *dependent covenants* and *concurrent covenants*.
6. Where one partner enters into a contract expressly in the name of his firm, but without the knowledge or express authority of his co-partners, by what test will it in general be determined whether the firm is liable on such contract or not? Illustrate by example.
7. Name the different departments presided over by the members of the Dominion Cabinet respectively.

## FLOTSAM AND JETSAM.

## FLOTSAM AND JETSAM.

## STATEMENTS OF PRISONERS THROUGH COUNSEL.

On December 3, the Attorney-General wrote to the Lord Chief Justice, drawing his attention to the fact that on Saturday, during the trial of Patrick O'Donnell, Mr. Russell proposed to state to the jury the instructions he had received from the prisoner's solicitor, and thereby convey to the jury the prisoner's account of every detail of the transaction they were inquiring into. Upon objection being taken to this course, Mr. Justice Denman said that (there being authority in favour of the statement being made) he should, while refusing to allow Mr. Russell to proceed, reserve a case for the consideration of the question by the Court of Crown Cases Reserved. Sir Henry James pointed out the inconvenience of the state of practice as thus illustrated, and added that he was under the impression that the judges had held a meeting and come to a resolution upon the subject; but Mr. Justice Denman stated this was not so. Lord Coleridge replied as follows:—

Royal Courts of Justice: Dec. 4, 1883.

My dear Mr. Attorney-General,—I entirely agree with you as to the practical importance of the question you have brought to my attention. The paper I enclose will show you that it is no new subject to me. Immediately after the trial of Lefroy at Maidstone, in which, as you may remember, Mr. Montagu Williams claimed to do what Mr. Russell did, I brought the matter before the judges, with the result which the paper will show you. At Maidstone the opinion of Lord Chief Justice Cockburn was said to have been founded on or supported by Lord Justice Lush and Mr. Justice Hawkins. Both those learned judges were present at the meeting called by me, and both disavowed in the strongest way ever having ruled or been inclined to rule in the manner suggested. Mr. Justice Denman authorizes me to say that if he had remembered the very strong judicial opinion which I enclose he should have acted on it, and have refused a case if one had been asked for. Mr. Justice Stephen authorizes me to say that he should, as a present adviser, not vote against the rule as formulated by the Master of Rolls, but approves of it, and should act upon it.

My reason for bringing the matter before a meeting of the judges was this—that directly after the passing of the Prisoners' Counsel Act, Lord Denman, the then Chief Justice, called the judges together, and they (as appears from the Judges' Book) agreed upon a course of practice which has always since been followed. It seemed to me that the question discussed in your letter was one of practice also, and that the best way of settling it was to pursue the course I took. Perhaps it might be well to make this resolution generally known, as there may be considerable difficulty in making the question the subject of a case reserved. Generally I agree with you that the practice is wrong and not to be permitted, and that if permitted at all, it must, in justice and fairness, carry with it the right of reply on the part of counsel for

the prosecution.—Believe me to be, my dear Mr. Attorney-General, your obliged and faithful servant,  
(Signed) COLERIDGE.

The Attorney-General, Q.C., M.P.

The paper enclosed was as follows:—

At a meeting of all the judges liable to try prisoners, held in the Queen's Bench room on November 26th, 1881 (Present—Lord Chief Justice Coleridge, Lord Chief Justice Baggallay, Lord Justice Brett, Lord Justice Cotton, Lord Justice Lush, Lord Justice Lindley, Justice Grove, Justice Denman, Baron Collock, Justice Field, Justice Manisty, Justice Hawkins, Justice Lopes, Justice Fry, Justice Stephen, Justice Bowen, Justice Mathew, Justice Cave, Justice Kay, Justice Chitty, Justice North), Lord Coleridge stated the subjects for which the meeting was summoned, and Lord Justice Brett moved the following resolution: 'That in the opinion of the judges it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence.'

Justice Stephen moved the following amendment: 'That in the opinion of the judges it is undesirable to express any opinion upon the matter.'

This amendment, having been put to the meeting, was negatived by nineteen votes to two. The original motion was then put, and carried by nineteen votes against two (Justice Hawkins and Justice Stephen dissent.). The question of the propriety of laying down a rule as to the practice of allowing prisoners to address the jury before the summing up of the judge, when their counsel have addressed the jury, was then considered, and after some discussion was adjourned for further consideration.—*Law Journal*.

By clerical error in our Sheet Almanac, Mr. Winchester's name still appears as Clerk of Queen's Bench. The name of course should be James S. Cartwright.

**LITTELL'S LIVING AGE**—This excellent publication begins its 160th volume in January. Foreign periodical literature, and especially that of England, continues to grow both in extent and importance; and *The Living Age*, which presents with satisfactory freshness and completeness the best of this literature, cannot fail to become more and more valuable.

The first weekly number of the new year has the following table of contents:—The Literature of Seven Dials, *National Review*; Wravall's Memoirs, *Temple Bar*; In the Wrong Paradise, *Fortnightly Review*; The Baby's Grandmother, a Story, *Blackwood's Magazine*; A Florentine Tradesman's Diary, *Saturday Review*; A Dancing Epidemic, *Chamber's Journal*; The Clerical Caste in Scotland, *Spectator*; together with choice poetry and miscellany. This, the first number of the new volume, is a good one with which to beg a subscription. For fifty-two numbers of sixty-four large pages each (or more than 3,500 pages a year) the subscription price (\$8) is low; while for \$10.50 the publishers offer to send any one of the American \$4 monthlies or weeklies with *The Living Age* for a year; both post-paid. Little & Co., Boston, are the publishers.

# Canada Law Journal.

VOL. XX.

JANUARY 15, 1884.

No. 2.

## DIARY FOR JANUARY.

- 15. Tue... Primary Ex. for Students and Articled Clerks begin.
- 20. Sun... 2nd Sunday after Epiphany.
- 21. Mon... First Intermediate Examination.
- 24. Thur... Second Intermediate Examination.
- 25. Fri... Sir F. B. Head, Lieut. Governor U. C., 1836.
- 27. Sun... 3rd Sunday after Epiphany.
- 29. Tue... Solicitor's Examination.
- 30. Wed... Barrister's Examination.
- 31. Thur... Earl of Elgin Governor-General, 1847.

TORONTO, JAN. 15, 1884.

WE have received two answers to the legal puzzle stated by us in our last issue, relating to Mr. G. O., his landed estate, and obnoxious tenant, so we can conclude that the rest of our nine hundred and ninety-nine subscribers (there is one lawyer not on our list) found themselves baffled by it. We will therefore put an end to the harassing suspense of these, and enable them to return to their legal duties with composure. The conveyancer to whom Mr. G. O. resorted bethought him of the change in the calendar which was made in the reign of George II. The lease dating back to the time of Charles II., it ran for two hundred years from the day of its date, which day of course related to the months and days of the old calendar, and thus a margin of a few days remained within which to give the necessary six months' notice.

SINCE our article on the change of time inaugurated by the railways, a valued correspondent states a point which certainly seems to render the legalization of the new time divisions somewhat more difficult, viz., that the railway time belts are to some extent arbitrary, and not true meridians. He says:—"The railway

people abandon meridians as boundaries of time belts, and propose zig-zags and curved fancy lines. They have thrown the whole Intercolonial Railway out of 75° time, and so made two standard times at Point Levis, differing by an hour from each other . . . and they intimate that they may change their time belts as they please." We cannot say how far this is true, of our own knowledge, but it would seem to throw a difficulty in the way of the Legislature sanctioning for universal adoption the changes suggested.

THE Privy Council in *Macdonald v. Whitfield*, 49 L. T. N. S., 446, has demolished the decision of the Court of Appeal of this Province in *Janson v. Paxton*, 23 C. P., 439, which laid down the doctrine that where several persons mutually agree to give their indorsements on a bill, as securities for the holder, who wishes to discount it, they must be held to have undertaken liability to each other, not as sureties for the same debt, and so jointly liable in contribution, but as proper indorsers liable to indemnify each other successively, according to the priority of their indorsements, unless it had been specially stipulated that they were to be liable as co-sureties. In the later case of *Fisken v. Mishaw*, 40 U. C. Q. B. 153, Wilson, J., thus referred to *Janson v. Paxton*: "I must say that *Janson v. Paxton* is directly opposed to the English authorities, both at law and in equity, and they are the authorities which ultimately govern our highest Court of Appeal, the Privy Council." This opinion is fully borne out by Lord Watson, who delivered the judg-

## ENDORSEMENT OF BILLS BY CO-SURETIES.—AUSTRALIAN CONFEDERATION.

ment of the Privy Council in *Macdonald v. Whitfield*. The result of the decision of the Privy Council is, that there is no hard and fast rule such as that laid down by our Court of Appeal, but on the contrary in every case the whole facts and circumstances attending upon the making, issue, and transfer of a bill or note may be referred to, in order to ascertain the true relations of the parties who have put their signatures upon it; and if those facts disclose that the parties were really sureties they will be entitled to contribution from each other, notwithstanding the order in which their names may appear upon the instrument.

### AUSTRALIAN CONFEDERATION.

It is perhaps more impossible for an intelligent Canadian, than it may be for an intelligent Englishman, not to feel a great interest in the steps being taken to effect a confederation of our Australian sister colonies. The student of politics, at all events, everywhere, will watch every step in the process of establishing this new Dominion. It is impossible to suppose that the Intercolonial Conference at Sydney have not looked to our records for guidance in the momentous movement they are inaugurating; yet it is strange, and perhaps not very flattering to our self-satisfaction, to see how widely they seem inclined to depart from the lines of the British North America Act. We read in that most interesting journal, *The Colonies and India*, the following:—"The Bill for the Constitution of a Federal Council, drawn up by the Intercolonial Conference, provides that each colony shall be represented by two members, and the Crown colonies by one member. There will be yearly sessions, and any three of the colonies will be competent to summon an extra session. The first session will be

held at Hobart, and be convened by the Governor of Tasmania. The summoning of subsequent sessions will be determined by the Council. The Council will be invested with legislative authority in regard to the relations of the colonies with the Pacific Islanders, the prevention of the influx of criminals, marriage, divorce, fisheries, naturalization, enforcement of criminal process, extradition, colonial defences, quarantine, patents, copyright, bills of exchange, and other matters. The Royal assent will be necessary to give effect to any decision arrived at by the Council, and will be given through the Governor of the colony where the Council may be in session. This Act will only be operative in the colonies which assent to its provisions, and will not have force until four of the colonies have signified their adhesion to the Bill."

The *London Spectator* in a recent issue adds the information that the members of the Council are to be appointed by the Legislature, two from each free colony, and one from each Crown colony, and that it is expected that the Premier of each colony represented will be in the Council.

Now, without intending to speak presumptuously, we must say this appears an arrangement open to grave objections. Not only are those safeguards absent which exist under our constitutional system against the mingling of Dominion and Provincial politics and questions, but the scheme seems calculated to render such mingling inevitable. With us a voter can give effect to his views on current Dominion questions by registering his vote for the party which favours them; while he can also give effect to his views on Provincial questions by voting, if necessary, for the opposite party. But the only way the Australian will be able to secure representation of his views in the Federal Council will be by voting

## AUSTRALIAN CONFEDERATION—PROCEEDINGS OF MICHAELMAS TERM, 1883.

for that party, at the Provincial elections, which supports these views in Federal questions. Yet this may obviously involve a sacrifice, on his part, of his convictions as to which party it is for the interests of his Province to see in power. For the Federal Council, it would appear, is to be the creature of the Provincial Legislatures. Hence either Dominion or Provincial interests will have to go to the wall, or be made subordinate, one to the other.

Then if all the Premiers are to be on the Federal Council, it seems inevitable that they will use their powers in the Council to influence the elections to the Provincial Legislatures in their several Provinces; and the system seems to render what we should term Dominion interference in Provincial matters inevitable. Again, if the Federal Council develop a centralizing tendency, the members having the Provinces under their control, there would appear to be great danger to Provincial autonomy.

These reflections, it appears to us, must occur to any one at all conversant with affairs in this country. But perhaps the exigencies of the occasion rendered such a scheme as the above the only one that would satisfy the majority of the delegates. Whatever the result of their deliberations, there can be no doubt Australia will have the warmest sympathy on the part of her Canadian sister, and we may look forward to a period of friendly and glorious rivalry between the two Dominions, to which no man shall fix the limits.

## LAW SOCIETY.

MICHAELMAS TERM, 47 VICT., 1883.

THE following is the *resumé* of the proceedings of the Benchers during Michaelmas Term, published by authority:—

During this term the following gentlemen were called to the Bar, namely:—Messrs. George Kappele, gold medalist, with honours; C. A. Masten, R. A. Porteous, Jas. A. Mulligan, John Soper McKay, W. J. Taylor, Thos. Chapple, Chas. Macdonald, R. A. Coleman, F. J. Dunbar, C. G. Jarvis, F. E. Titus, A. J. Reid, A. Mackenzie, W. H. Barry, E. Bell, W. J. Wallace, J. J. A. Weir, Jas. Garbutt.

The following gentlemen received certificates of fitness, namely:—Messrs. George Kappele, T. T. Porteous, A. E. Barber, W. J. Taylor, J. D. Gausby, W. B. Dickson, C. H. Cline, Wm. Cook, Charles Henderson, F. J. Dunbar, J. W. Hanna, D. C. Murchison, R. A. Coleman, Jas. Garbutt, W. H. McLean, J. P. Telford, J. G. Jones, W. J. Wallace, E. Bell, J. M. Kelbourne, Hugh McMillan, J. Stuart, F. S. Wallbridge, H. C. Hamilton, Chas. Macdonald, C. H. Ivey.

The following gentlemen passed the first intermediate examination, namely:—E. W. H. Blake, honours and first scholarship; A. E. O'Meara, honours and second scholarship; O. K. Fraser, honours, and third scholarship; W. E. Raney, A. M. Taylor, R. S. Hays, E. A. Holman, W. S. Ormiston, T. McIntosh, W. H. Sibley, H. Wissler, J. Nason, A. C. Morris, W. J. Tremear, J. C. Judd, F. M. Gray, G. G. S. Lindsey, T. Urquhart, R. Vanstone, J. P. Eastwood, J. Carson, E. R. C. Martin, O. L. Lewis, R. G. Fisher, M. J. McCarron, R. B. Beaumont, A. D. McLaren, Thos. Hobson, Andrew Grant, J. H. Bobier, H. J. Dawson, W. J. McWhinney, H. W. Bucke, A. S. Campbell, N. J. Clark, J. Craine, W. G. Fisher, S. T. Hamilton, F. Hornsby, J. J. Smith, F. Stone.

The following gentlemen passed the second intermediate, namely:—A. Caruthers, honours and first scholarship; A. E. Kennedy, honours and second scholarship; A. S. Lown, A. M. Dymond, G. Wall, J. A. Valin, A. A. Mahaffy, W. E. Middleton, A. B. McBride, J. D. S. C. Robertson, John Douglas, F. R. Powell, D. S. Kendall, T. C. Milligan, P. H. Simpson, D. W. Saunders, T. B. Bunting, W. D. Jones, J. E. Moberly, E. McKeough, Alex. Skinner, F. W. Thistlewaite.

The following gentlemen were admitted into the Society as students-at-law,—

## PROCEEDINGS OF MICHAELMAS TERM, 1883.

namely:—*Graduates*: T. F. Lyall, W. G. H. McAllister, C. J. McCabe, J. S. Skinner, W. S. Harrington, F. W. Raines. *Matriculants*: D. R. Anderson, E. P. McNeil, C. Elliott, J. B. Lucas, W. F. Bannerman, F. B. Featherstonhaugh, D. S. Wallbridge, F. C. Jarvis, Ira Standish, W. P. McMahon.

*Juniors*:—A. Bridgman, H. C. Rose, Colin McIntosh, W. A. Thrasher, D. A. Dunlop, T. B. Denton, M. Routhier, W. S. Livingston, J. A. Chisholm, Paul Jarvis, M. H. Simpson, Thos. Scullard, J. Harper.

Monday, November 19th.

Present:

The Treasurer, and Messrs. Bethune, Ferguson, Murray, Foy, MacLennan, Moss, Crickmore, Robertson, Mackelcan, J. F. Smith, Martin.

The report of the Finance Committee on the subject of the supply of heat, water and light to Osgoode Hall was presented and read, and ordered to be considered on 20th November.

Tuesday, November 20th.

Present:

The Treasurer, and Messrs. MacLennan, Murray, Robertson, Martin, Hudspeth, Read, Bethune, L. W. Smith, Crickmore, Moss, J. F. Smith, Mackelcan, Ferguson, Hoskin.

The report of the Finance Committee on the subject of heating, lighting, etc. Osgoode Hall, which was presented on the 19th, was considered and unanimously adopted.

The Finance Committee were directed to negotiate with the Government on the subject.

Mr. MacLennan presented the report of the Reporting Committee as follows:—

The Committee on Reporting beg leave to report as follows:

1. The Committee have had under their consideration the subject of the decisions in the Chancery Division of the High Court, and they are of the opinion that it is impossible to overtake the efficient reporting of those decisions with the present staff.

2. The Committee have also, after full discussion and careful consideration, in which they were assisted by the editor, agreed to recommend, as the best means of meeting the difficulty, the immediate ap-

pointment of another reporter to the High Court, at a salary of twelve hundred dollars a year.

3. In the meantime in order to expedite the issue of the Chancery cases in arrear the Committee took the responsibility of authorizing the editor to provide assistance to Mr. Lefroy until permanent arrangements could be made.

All which is respectfully submitted.

(Signed) JAMES MACLENNAN.

Nov. 20th, 1883.

The report was adopted.

Mr. MacLennan introduced the following rule, based upon the report, namely,

That section 3 of rule 109 be amended by substituting the word "four" for the word "three" in the first line thereof.

The rule was read a first time and was ordered to be read a second time on Saturday, 24th November.

Mr. Martin gave the following notice for next meeting, namely, That the questions put by the examiners at the intermediate and final examinations be published.

Saturday, Nov. 24th, 1883.

Present:

Messrs. Crickmore, Martin, Murray, Ferguson, Foy, Bethune, MacLennan, J. F. Smith, McCarthy, Moss, Read.

Mr. MacLennan was elected Chairman in the absence of the Treasurer.

Mr. W. H. Steele's petition was referred to Finance Committee.

Mr. Lee's letter was read—no action taken.

The letter of Mr. Tully referring to the use of water by the contractors was referred to Finance Committee.

The rule to amend rule 109, respecting the reporters introduced by Mr. MacLennan, was read a second and third time and was adopted.

Mr. Martin's motion for the publication of the questions put by the examiners was referred to Legal Education Committee, with power to act.

Friday, November 20th.

Present:

The Treasurer, and Messrs. Mackelcan, S. H. Blake, Murray, McMichael, Britton, MacLennan, J. F. Smith and Crickmore.

A letter from Mr. W. A. Taylor, the Sec-

## PROCEEDINGS OF MICHAELMAS TERM, 1883.

retary of the Manitoba Law Society, respecting the supply of Ontario reports to the Manitoba Bar was read and referred to the Committee on Reporting for consideration and report.

Saturday, December 8th.

Present :

The Treasurer, and Messrs. Crickmore, Guthrie, Foy, Ferguson, Hoskin, Murray, Beaty, L. W. Smith, Mackelcan, Read, J. F. Smith, Maclellan, Bethune, Moss, McMichael.

The petitions of Messrs. Livingston and Vance were granted, the Legal Education Committee having reported favourably upon them.

Mr. Maclellan presented the second report of the Committee on reporting as follows :—

8th December, 1883.

The Committee on Reporting beg leave to report as follows :

1. Seventeen applications for the new reportership have been received from qualified persons and their names are submitted.

2. Since last Term Mr. Grant has issued the last number of volume 29 of Grant's Reports which is now practically complete, with the exception of the index. He has also issued a number of volume 8 of the Appeal Reports. He is still however very largely in arrear with the Appeal Reports, but says that 500 pages are nearly ready to issue. The Committee recommend that no adverse action be taken at present with reference to the backward state of these reports.

3. The Chancery Division Reports are in a very forward state, but an unavoidable delay has occurred in the issue of a large number of cases at the last moment.

4. The work in the other Courts is in a satisfactory state with the exception of the Index of volume 2 of the Ontario Reports, and 32 Common Pleas.

5. The digest is in a forward state. It will comprise the following volumes complete :—29 Grant, 32 Common Pleas, 46 Queen's Bench, 3 Ontario Reports and 9 Practice Reports; and it is confidently expected that it will be in the hands of the profession by the 1st day of May next.

6. The Committee have had a number

of interviews with the editor, who has made several suggestions as to modification of the rules relating to reporting, which your Committee think well worthy of careful consideration.

All which is respectfully submitted.

(Signed), JAMES MACLENNAN,  
*Chairman.*

The report was ordered for consideration paragraph by paragraph.

The first paragraph was adopted. At this stage of the proceedings Mr. Boomer was elected a joint-reporter of the High Court of Justice.

The second paragraph of the report was adopted.

The third, fourth, fifth and sixth paragraphs were adopted.

Mr. Maclellan, from the Reporting Committee, presented their report on the letter of Mr. Taylor, the Secretary of the Manitoba Law Society, in the matter of the supplying of Ontario reports to that Society.

The report was ordered to be considered at the next meeting of Convocation.

On the motion of Mr. Murray, it was ordered that the Finance Committee be instructed to order for the Convocation room and dining-room such furniture as may be deemed necessary.

Mr. Poole's petition was refused.

The petitions of Messrs. S. W. Burns and R. W. Witherspoon were refused.

Wednesday, Dec. 26th.

Present :

The Treasurer, and Messrs. Crickmore, Murray, J. F. Smith, Foy, Irving, Maclellan, Guthrie, Hoskin, Cameron, Moss, McMichael.

The report of the Finance Committee on the petition of W. H. Steele was adopted.

The report of the Reporting Committee on the letter of the Secretary of the Manitoba Law Society, appointed to be considered to-day, was read as follows :—

The Committee on Reporting beg leave to report as follows :

They have had under consideration an inquiry from the Law Society of Manitoba whether arrangements could be made by which the Ontario Reports could be supplied to the members of that Society; and

## RECENT ENGLISH PRACTICE CASES.

they find that the number which will be required is about one hundred.

Your Committee recommend that the reports be supplied to the members of the Manitoba Law Society at the price of \$17.50 a year in advance, provided that not less than eighty sets be taken, the sets to comprise the Appeal Reports, the Ontario Reports and the Practice Reports, reserving to Convocation the right to alter the price at the end of any year.

All which is respectfully submitted.

On the motion of Mr. Cameron it was ordered,

That the thanks of Convocation be given to the Rev. Dr. Barclay, for his gift to the Society of a copy of his sermon, preached on the occasion of the death of Chief Justice McLean.

Convocation adjourned.

## REPORTS.

## RECENT ENGLISH PRACTICE CASES.

## BURSTALL V. FEARON.

*Imp. O. 50—Ont. O. 44.*

*Revivor—Death of sole Plaintiff—Administration Proceedings.*

[L. R. 24 Ch. D. 126.

A person served with notice of an administration judgment, and who has obtained liberty to attend the proceedings under it, is in the same position as a party to the action, and is entitled to obtain an order of course to revive the action on the death of the sole plaintiff.

## BUTCHER V. POOLER.

*Imp. Jud. Act, sec. 49, O. 55, r. 1—Ont. Jud. Act, sec. 32, r. 428.*

*Partnership suit—Costs of unsuccessful claim—Appeal for costs.*

[C. A. L. R. 24 Ch. D. 173.

On the death of one member of a certain partnership, an action was instituted by his executrix, in which a decree was made to administer the partnership estate. In the course of the administration a dispute as to

facts arose, which was first dealt with by the Chief Clerk, and then adjourned into Court, and the decision was adverse to the plaintiff. Bacon, V.C., decided against her, but ordered the costs of the enquiry to come out of the estate. The defendants, the surviving partners, now appealed from this order as to costs.

The question was whether the Court had jurisdiction to hear the appeal.

*Held*, that the case did not come within the rule in *Foster v. Great Western Railway Company*, L. R. 8 Q. B. D. 25, 515, that the Court cannot make a successful defendant pay the costs of a plaintiff who has wholly failed; but that it was within the discretion of the Court to order all costs reasonably incurred in ascertaining the fund to be paid out of the fund, and that an appeal would not lie.

NOTE.—*The appellants argued in the above case that there was no jurisdiction to make a successful party pay costs, citing Johnstone v. Cox, L. R. 19 Ch. D. 17; and Foster v. Great Western Railway Company, L. R. 8 Q. B. D. 25, 515. The case is a good one to refer to on the question of appealing in respect to costs.*

## IN RE AGAR ELLIS, AGAR ELLIS V. LASCELLES.

*Imp. Jud. Act, sec. 25, sub.-s. 10—Ont. Jud. Act, sec. 17, sub.-s. 9.*

*Infants—Habeas Corpus—Prevalence of Equity.*

[C. A. L. R. 24 Ch. D. 323.

It is not correct to say the law is altered by this section. The Courts of law and equity administered the law alike in proceedings under writs of *habeas corpus*.

## PRESTNEY V. CORPORATION OF COLCHESTER.

*Imp. O. 31, rr. 11, 12—Ont. Rules 221, 222.*

*Production of documents—Place of production.*

[C. A. L. R. 24 Ch. D. 376.

Where an order has been made for production of documents at a particular place the Judge or his successor may at any time make a fresh order appointing a different place, if the circumstances render it advisable. And although such an order may be appealed from

## RECENT ENGLISH PRACTICE CASES.

the Court will not interfere with the Judge's direction except on some special ground.

In this case an order was made for production by the defendants at London. Six months after another order was made, on the application of the defendants, for production at Colchester, but the Court of Appeal, on the matter coming before them, added a direction that the plaintiffs should be at liberty to apply for the production of any documents which might be more conveniently examined in London; and that the defendants should undertake to pay any additional costs caused by the alteration in the place of production.

## IN RE PEACE V. WALLER.

*Imp. Jud. Act, s. 25, sub.-s. 8—Ont. Jud. Act, s. 17, sub.-s. 8.*

*Costs—Taxation of solicitor's bill—Receiver.*

[C. A. L. R. 24 Ch. D. 405.]

M., a married woman, by her next friend, applied to tax the bill of costs of her solicitor incurred in a suit relating to her separate estate. After the Taxing Master's certificates had been filed, an order was made on the application of the solicitor, directing an enquiry of what M.'s separate estate consisted at the date of the filing of the certificate capable of being reached by the judgment and execution of the Court, and appointing a person to receive it until the amount found due on taxation was paid.

*Held*, that this order was proper, and that it was not necessary to take separate proceedings by action to enforce the demand against the separate estate.

## IN RE MANITOBA ECONOMIC BUILDING SOCIETY.

*Ont. J. Act, secs. 38, 39—Imp. O. 58, r. 15 (1875).*

*Appeal—Extension of time for appeal—Special grounds.*

A creditor of a certain company filed a petition in court for a supervision order or a compulsory winding up order of the company, in necessary ignorance of the fact, as was also the Court, that a

preceding extraordinary resolution of the shareholders to wind up the company voluntarily was invalid. A supervision order was made. Five months afterwards he discovered the invalidity of the said resolution, and now moved before the Court of Appeal for leave to appeal against the supervision order notwithstanding the lapse of time. The proper time for appealing from the supervision order was twenty-one days, "except by special leave of the Court of Appeal." (*Imp. O. 58, r. 15, 1875.*)

*Held*, that leave to appeal, notwithstanding the lapse of time, ought to be granted, the mistake as to the validity of the resolution forming a special ground for the application, and the respondents having no equity to resist it.

[C. A. L. R. 24 Ch. D. 488.]

*Per* BRETT, M. R.—It has been attempted to define and circumscribe, and lay down in other words than are laid down in the rule (*Imp. O. 58, r. 15, 1875; cf. R. S. O., 38, s. 45*), the jurisdiction and duties of the Court of Appeal. That rule must stand as it was written; it must stand as it was adopted by Parliament; and what the Court has in each case to do is to see whether there are grounds for the Court to give the special leave; and I know of no rule other than this, that the Court has power to give the special leave, and, exercising its discretion, is bound to give the special leave, if justice requires that that leave should be given.

*Per* COTTON, L. J.—In order that the appellant may be relieved from lapse of time, it is not necessary to shew that there has been anything in the conduct of the respondent which entitles the appellant to be relieved, it is sufficient if he satisfies the Court that there has been something either in the acts of the respondent or from other circumstances which entitle him to be relieved, and to be allowed to appeal notwithstanding the time has elapsed.

*Per* BOWEN, L. J.—It seems to me that to attempt in any case to lay down a set of iron rails on which the discretion of the Court of Appeal was always to be obliged to run, and to say that the leave of the Court would never be granted except in certain special circumstances and in a defined way, would be very perilous. Of course it is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood, but which had better not

Q. B. Div.]

NOTES OF CANADIAN CASES.

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be defined in a case except so far as may be necessary for the decision of that case, otherwise there is the great danger, as it seems to me, of crystallizing into a rigid definition, that judicial power and discretion which the Legislature and the Rules of Court have, for the best of all reasons, left undetermined and unfettered. If the person who is asking for leave to appeal after twenty-one days is only asking for what is just, why should he not have it?

### NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

#### QUEEN'S BENCH DIVISION.

Wilson, C. J.]

HYNES ET AL. V. FISHER ET AL.

*Master and servant—Intimidation of servant—  
Injunction—Suppression of facts on motion ex  
parte for injunction—Dissolving injunction on  
motion to continue.*

On a motion to continue an injunction, the defendant may bring forward such facts as he might if he were moving to dissolve the injunction, and may show suppression of facts by the plaintiff as a ground for dissolving it, and may thereupon move to dissolve it.

The plaintiffs individually were members of the Master Plasterers' Association, and the defendants individually were members of the Operative Plasterers' Association. The plaintiffs did not by their writ state in what character they sued, but, by their affidavits filed, professed to represent their association, and joined the defendants as representing the Operative Association. Some of the defendants, by threats, intimidation and violence, prevented one man, who had contracted to work for one of the plaintiffs, from fulfilling his contract, and induced him to leave Toronto, where he had been hired to work, whereby his master suffered injury to his business.

*Held*, that this entitled the master to an injunction, restraining these defendants from so interfering with his servants.

It appeared that previous to the intimidation four workmen had struck work with one W., a member of the plaintiff's association, because W. had refused to pay one of his workmen the wages demanded for him by them. Thereupon, the plaintiff's association passed a resolution imposing a fine on any of its members who should employ the four striking workmen, and communicated this to the defendants' association. The latter demanded the rescission of the resolution, and notified the plaintiff's association that in default the workmen would strike. The resolution was not rescinded, and the workmen struck. The intimidation complained of by the plaintiffs followed as a consequence.

*Held*, that the defendants, by showing the fact of the resolution of the plaintiff's association, which the plaintiffs had not divulged on their motion ex parte for the injunction which they now moved to continue, were entitled to have the injunction dissolved.

*Held*, also, upon the merits, that the plaintiffs were not entitled to the injunction on account of their resolution.

S. H. Blake, Q.C., and O'Sullivan for the plaintiffs.

Osler, Q.C., and Fullerton for the defendants.

Wilson, C. J.]

HYNES ET AL. V. FISHER ET AL.

(McCord and Jenkins' Case.)

*Injunction—Interference with process—Contempt of court—Parties in representative capacity.*

Pending the injunction in this case, one P., who was not a party to this action, but was a member of the plaintiff's association, on behalf of the association hired one H. to work for him. McCord and Jenkins, members of the defendant's association but not parties to the action, hearing of this, went to H., and induced him to refuse to work for P., and to leave Toronto. The Court was of opinion that M. and J. knew of the injunction pending at the time. The plaintiffs did not state by their writ that they sued in any representative character, nor did they sue the defendants in a representative capacity; but the plaintiffs' affidavits stated that the plaintiffs represented

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NOTES OF CANADIAN CASES.

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their association, and the defendants, theirs. On motion to commit M. and J. for contempt of process of the Court.

*Held*, that the Master Plasterers' Association was not made a party to nor sufficiently represented in the action by the allegations in the plaintiffs' affidavits; and that no act against the plaintiffs individually having been established, M. and J. could not be held guilty of contempt for interference with the association, and that, though the association might be added by amendment, the injunction would also have to be amended, and in the meantime M. and J. must be acquitted of contempt of this injunction as it now stands, and therefore the motion must fail.

#### COMMON PLEAS DIVISION.

Osler, J.]

#### PHOENIX INSURANCE CO. v. ANCHOR INSURANCE CO.

*Marine Act—Contract in accordance with rules—Seaworthiness—Total loss—General average—Particular average—Costs.*

On the 1st September, the plaintiffs insured the vessel, *Mary Merritt*, for \$6,000, for fifteen days, by acceptance of an application for insurance, called a "binding application," made to them by M., the owner. On the same day, on application of the plaintiffs a memorandum was written on the margin of the application, and signed by the manager and secretary of the defendants' companies, that they covered one-fourth, subject to survey and approval at first port of arrival, etc. On the 4th April, an agreement was signed by defendants' president and manager, under which defendants were to cover a fourth part of the risks accepted by plaintiffs; but it was expressly agreed that the risks covered were only on hulls of vessels not classed below B 1.

By the defendants' Act of Incorporation, 36 Vict. ch. 103, all policies, instruments, etc., issued or entered into by defendants, were to be signed by the president or vice-president,

and countersigned by the manager and secretary, or as otherwise directed by the rules and regulations of the company in case of their absence, and so signed it should be deemed valid, etc.

*Held*, that the agreement of the 4th April could not be relied on, as it was limited to vessels not below B 1, and the evidence shewed that the vessel here had never been classed; but that the contract was contained in the memorandum written in the margin of the application, and that it was so signed so as to be binding on the defendants; for that, in the absence of evidence to the contrary, it must be deemed to be signed in accordance with the rules and regulations of the company.

It appeared that the vessel was driven ashore on the 6th September, whereupon the plaintiffs, of their own motion, procured a tug, steam pumps, etc., got the vessel off, and towed her to Detroit, where she was put into dry-dock and repaired. The salvage charges, and repairs, etc., amounted to \$4,000. On 26th September, the owner notified the plaintiffs that he abandoned the vessel, and would not be responsible for any of the expenses, etc.; whereupon the plaintiffs settled with him for some \$3,000. On 29th September, the vessel was libelled for seamen's wages, and salvage charges, and was subsequently sold to pay same. The actual damage done to the vessel only amounted to \$190. At the time of the accident the vessel had only one anchor, having lost a short time previously the second one she had.

*Held*, that, if there was no express warranty as to seaworthiness, and being a lesser policy none could be implied; and that there was no evidence to shew that the having only one anchor constituted unseaworthiness.

*Held*, also (1) there was no total loss so far as defendants were concerned; (2) defendants were liable as upon a general average for expenses incurred by plaintiffs as salvors and insurers in saving the ship, after deducting the proportion to be borne by the owners or the vessel and cargo, etc.; (3) the cargo was in fact valued by the plaintiffs and delivered to the owners; (4) there was no particular average for which the defendants were responsible, or towards which defendants were liable to contribute. The pleadings were directed to

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[Prac.]

be amended according to the findings, and the costs apportioned.

*McMichael*, Q.C., and *W. T. Boyd* for the plaintiffs.

*Osler*, Q.C., and *Biggar* contra.

Rose, J.]

[Dec. 21, 1883.]

COOPER ET AL. V. CENTRAL ONTARIO  
R. W. Co.

*Verdict subject to reference—Failure of reference by lapse of time—Setting aside verdict in single court—Venue, change of.*

At the Ottawa assizes, a formal verdict was entered for the plaintiff, subject to a reference. The reference failed through the omission of the arbitrator to enlarge the term for making the award.

A judge in High Court set aside the verdict and ordered a new trial.

The plaintiffs resided at Montreal, and the defendants' offices at Ottawa, and some of the plaintiff's witnesses resided at Toronto; and it appeared that Toronto was as easily accessible as Ottawa, and that unless a change of venue was directed, the case would be laid up until the spring assizes.

Under these circumstances the venue was changed to Toronto, and the case directed to be tried at the January sittings.

*Arnoldi*, for the plaintiff.

*Marsh*, for the defendant.

#### PRACTICE.

Mr. Dalton, Q.C. }  
Cameron J. }

[Nov., 1883.]

CITIZENS' INSURANCE CO. V. CAMPBELL  
ET AL.

*Particulars—Motion to strike out—Evidence.*

In an action of libel, the defence was a general statement of the truth of the alleged libel. An order was made for particulars under this defence, and particulars were delivered. The plaintiffs moved to strike them out or prevent evidence being given upon them at the trial, as being too general. The Master in Chambers

*Held*, that particulars cannot be struck out; but if the particulars delivered are too general the Judge at the trial will exercise his discretion as to the admission of evidence thereunder.

On appeal, CAMERON, J. sustained the Master's order.

*Rae*, for plaintiff.

*Osler*, Q.C., for defendant Campbell.

*H. J. Scott*, Q.C., for defendant McCord.

Mr. Dalton, Q.C.]

[Nov., 1883.]

ROBINSON V. BERGIN.

*Writ of attachment binds land from seizure—What is a seizure?*

The mere fact that a writ of attachment against an absconding debtor is in the Sheriff's hands does not bind the debtor's land, and the land is not bound until seizure.

*Warrener v. Kingsmill*, 13 U. C. R. 18, followed.

The Sheriff's bailiff went to, and entered upon the land of the debtor, on which his family resided, and finding there no goods, did not leave anyone in possession; he said that he had no instructions beyond the warrant to seize the land; he told the debtor's wife at the time that the land would be sold, but he did no other act of seizure.

*Held*, that there was no seizure.

*Aylesworth*, for the attaching creditors.

*H. J. Scott*, Q.C., for execution creditors.

Cameron, J.]

[Dec. 1883.]

IN RE JENKINS V. MILLER.

*Prohibition—Division Court—Jurisdiction—Set off.*

The plaintiff brought his action in a Division Court for \$74.31, his claim being \$156.36, an unascertained amount, as against which he admitted a set-off of \$82.05. At the trial in the Division Court the plaintiff affirmed and the defendant denied that there had been an agreement between them to set off against the plaintiff's claim the value of certain purchases made by the plaintiff from the defendant, and

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NOTES OF CANADIAN CASES.

[Prac.]

the judge at the trial found as a matter of fact that there had been such an agreement.

Upon motion for prohibition :

*Held*, following *Fleming v. Livingstone*, 6 P.R. 63, and *Dixon v. Snarr*, 6 P.R. 336, that it was a question of fact for the judge of the Division Court to determine whether or not there was an agreement between the plaintiff and defendant, and the judge having determined that there was an agreement, there was jurisdiction.

*Prohibition refused.*

*G. Bell*, for the motion.

*McVittie*, contra.

Mr. Dalton, Q.C.]

[Dec. 22, 1883.]

MCLEAN v. SMITH.

*Judgment against married woman—Setting aside—Lapse of time.*

Motion to set aside judgment entered in 1878 against one of the defendants, the wife of her co-defendant, on the ground that she is and was a married woman, and the judgment is therefore not justified. The original process in the action was served upon the defendant, the married woman, personally, and upon this application she swore that she handed it to her husband, but never authorized anyone to act for her as solicitor. She was not proceeded against as a married woman. D., an attorney, appeared for her and her husband, and judgment was signed against both defendants, by consent of D., on an order made in Chambers as long ago as 1875. Execution was at once issued under the judgment, and the personal property of the female defendant was seized and sold by the sheriff without complaint from her. It appeared that at the time of the commencement of the suit the married woman had an interest in certain real estate, which she and her husband conveyed away after action brought and before judgment.

No affidavit from the male defendant, nor from D., the attorney, was filed.

The Master in Chambers

*Held*, that after the long lapse of time and under the circumstances shown he could not set aside the judgment.

*McClive*, for the motion.

*A. C. Gall*, contra.

Rose, J.]

[Dec. 24, 1883.]

WILSON v. WAINFLEET.

*Municipal law—Opening road allowance.*

This was an application by plaintiff for a mandamus to compel the municipal council of the township of Wainfleet to open an original road allowance.

A by-law had been passed by the council in June, 1882, and notice given to the parties in possession to remove all fences and other obstacles from the road allowance. Nothing further was done by the council up to the time of making the application, Nov. 1, 1883.

Rose, J.

*Held*, that it is discretionary with and not obligatory upon a municipal council to open a road allowance, and the fact that a by-law had been passed did not create such an obligation, and that a mandamus would not be granted.

*Osler*, Q.C., for plaintiff.

*C. Robinson*, Q.C., and *Cox*, for defendants.

Wilson, C. J.]

[Nov. 2, 1883.]

COOKS v. STROUD.

*Examination of judgment debtor—Unsatisfactory answers.*

Motion to commit defendant, etc.

A satisfactory answer, upon examination as a judgment debtor, according to the statute R.S.O., c. 50, sec. 305, means more than that the answer shall be a full, appropriate, and pertinent answer to the question: it means that the answers shall show a satisfactory disposition of the property.

The defendant in his examination said he had no real estate nor any personal estate.

In the fall of 1882 he had about \$300 in money; he paid his bills with it, and lost the balance at the horse races at Buffalo. Since the fall of 1882 he has been in his father's employ; he gets nothing but his board and clothing.

When he conveyed the tannery lot to his father, which he held in trust for him, he said: "I could not say what the consideration was, or whether I was paid anything or not; I for-

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get; I can't think of it, I forget whether I received any money for that then or since; it was before judgment. . . . My father wanted me to get it fixed."

*Held*, that the defendant, in his examination, had disclosed his property and his transactions respecting the same; and had not concealed or made away with his property in order to defeat or defraud his creditors.

*Held*, however that the defendant had not answered fully or truthfully with respect to the fact of receiving or not receiving money or other considerations for signing the tannery deed, or the amount of it, if he did receive any such money or consideration; and that the answers he had given respecting his transactions with his property were not satisfactory by reason of the illegal and wrongful disposition of it by gambling or horse-racing and otherwise.

Defendant allowed to appear for further examination, and ordered to pay costs of first examination and this application forthwith.

*Aylesworth*, for the plaintiff.

*Holman*, for the defendant.

Proudfoot, J.]

[Nov. 28, 1883.]

### MCPHERSON v. MCPHERSON.

*Tenants in common—Claim against co-tenants for excess of rent received—Execution creditors—Priority.*

The plaintiff was tenant in common with the defendants, and is proved to have received more than his proper share of the rent. The defendants claimed against the plaintiff's share of the land for the excess of rent received by the plaintiff. There were executions in the sheriff's hands, and the execution creditors had come in under the decree in the cause.

*Held*, that the defendant's claim being simply for a debt for which an action might be brought there is no actual change until a judgment was obtained.

The execution creditors do not lose their priority by coming in under the decree, and are entitled to have it maintained.

*Held*, that the case is not varied by some of the defendants being infants.

*Purdom*, for the appeal.

*J. Hoskin, Q.C., Hoyles, and Macbeth*, contra.

Mr. Dalton, Q.C.]

[Dec. 31, 1883.]

### DAVIES v. HUBBARD.

*Notice of trial—Service—Leaving copy in office of defendant's solicitor.*

Service of notice of trial effected by leaving a copy of the same in the office of the defendant's solicitor before six o'clock, but after the solicitor and his clerks had left for the day, *held* to be good service only from the time when the notice came to the knowledge of the solicitor.

The practice laid down in *Consumers' Gas Co. v. Kissock*, 5 U. C. 542, and in *McCallum v. Provincial Ins. Co.*, 6 P. R. 101, *held* not to have been altered by the O. J. A. as to service upon defendant's solicitor.

*A. G. McLean*, for the defendant.

*H. Cassels*, for the plaintiff.

Proudfoot, J.]

[Jan. 9, 1884.]

### CHRISTOPHER v. NOXON.

*Taxation—Witnesses—Abortive Trial.*

A taxing officer refused to allow the plaintiffs the expenses of seventeen witnesses who were subpoenaed to attend a trial at Hamilton which proved abortive, the trial being postponed because the defendants had not obeyed an order to produce.

The defendants were ordered to pay the costs of the hearing at Hamilton rendered nugatory by the postponement.

The seventeen witnesses were subpoenaed to be examined at the abortive trial, and were examined at the adjourned trial upon matters which the judge held could not be interfered with by the court.

*Held*, on appeal from the taxing officer that in refusing the plaintiffs the costs of subpoenaing these seventeen witnesses the taxing officer did not erroneously exercise the discretion given him by Rule 442, O. J. A.

*G. Bell*, for the appeal.

*Hoyles*, contra.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Mr. Dalton, Q.C.]

[Jan. 12.]

## CLARK V. ST. CATHARINES.

*Security for costs—Plaintiff not able to answer costs and put forward by others.*

Security for costs was ordered in an action brought by a ratepayer for himself and the other ratepayers to restrain the delivery by the corporation of certain debentures to a Railway Company, where it appeared from the examination of the plaintiff that he was financially incompetent to pay the defendants' costs, and was only interested to an insignificant extent; and where he swore that he expected certain persons named to pay his costs and to protect him should the case go adversely, that he did not want to spend any money on the prosecution of his own right in the matter, and that he did not know who instructed the plaintiff's solicitor.

*Plumb*, for the motion.

*Hoyles*, contra.

Mr. Dalton, Q.C.]

[Jan. 14.]

## DOERR V. RAND.

*Security for costs—Præcipe order for—Setting aside—Stay of proceedings.*

A defendant is not necessarily entitled to security for costs because the plaintiff's residence is out of the jurisdiction.

If it be made apparent by evidence, which the court should look at, that the defendant has no defence, security will not be ordered.

The defendant admitted on his examination in this cause, that he owed the debt sued for, but he afterwards alleged a counterclaim for illegal arrest by the plaintiff in the course of this action.

*Held* that, under these circumstances, the defendant was not entitled to security for costs, and a *præcipe* order for security was set aside with costs.

*Held*, that a *præcipe* order for security for costs is a stay of proceedings while it exists, and a motion for judgment made simultaneously with the motion to set aside the *præcipe* order for security for costs was refused.

*Cameron* and *McPhillips*, for plaintiff.

*A. B. Cox*, for defendant.

Boyd, C.]

[Jan. 14.]

## RE LYONS.

*Costs—Scale of.*

After a mortgage sale, the first mortgagee paid the surplus proceeds of sale, \$162, into court.

The third mortgagee petitioned for payment out to him of the \$162, alleging that the second mortgage was void for want of consideration, etc.

A reference was directed, and the Master found that the second mortgage was valid, and that a much larger amount than \$162 was due upon it. The claimants of the fund lived in three different counties.

An order made upon further directions gave the second mortgagee the costs of the petition and reference.

Upon appeal from the Taxing Officer, who decided to tax the costs upon the higher scale.

*Held*, that what was in contest was the whole amount represented by the second mortgage, and the subject matter thus involved exceeded the limits of the former equitable jurisdiction of the County Court, and therefore, and also because the different respondents resided in different counties, and the money in question was in court in a third county, the Taxing Officer was right in taxing costs upon the higher scale.

*A. C. Galt*, for the appeal.

*W. Cassels*, Q.C., contra.

Boyd, C.]

[Jan. 14.]

## MANSON V. MANSON.

*Purchaser at judicial sale—Delivery of possession—Growing crops—Knowledge by purchaser of tenancy.*

At a judicial sale of a farm, the conditions were the usual conditions of the court, providing for the delivery of possession to the purchaser upon payment of the balance of the purchase money one month after the sale. The purchaser lived upon a part of the lot which was not sold, and was aware that the farm sold was occupied by a tenant, but swore that he did not know the terms of the tenancy that he relied upon the conditions of sale, and

Prac.]

NOTES OF CANADIAN CASES.—NEW LAW SCHOOL AT HALIFAX.

that he bid more for the land because there were growing crops thereon. The purchaser paid the balance into court at the proper time, but did not get possession then, nor had he got possession at the time of this application (Jan. 7th, 1884).

Motion for an order for delivery of possession to the purchaser, and for compensation for not getting the crops or the possession at the time agreed upon, and for a vesting order.

*Held*, that the vendors were bound by the terms of the printed and published conditions of sale, and that it was not the business of the purchaser to acquaint himself with the terms of the tenancy, and by inquiry to ascertain whose were the crops.

Order made as asked, with a reference as to compensation.

*Watson*, for the purchaser.

*W. Mortimer Clark*, for the plaintiffs.

*Harcourt*, for the infants.

Boyd, C.]

[Jan. 14.]

# BLAKE V. BUILDING AND LOAN ASSOCIATION.

## *Appeal—Report—Time—Christmas Vacation.*

The term vacation in G. O. Chy. 642, means Christmas Vacation as well as Long Vacation, and hence the former is not to be counted in the time within which an appeal from a Master's Report may be had under that order.

Notice of appeal from a report dated 29 Nov., 1883, given on the 31st Dec., 1883, for the 7th Jan., 1884, is valid.

*W. Cassels, Q.C., and Rolph*, for appellant.

*Hamilton*, contra.

## LAW STUDENTS' DEPARTMENT.

### NEW LAW SCHOOL AT HALIFAX.

A correspondent sends us a copy of a Halifax paper giving the following account of the organization of a new law school at Halifax, which will be of interest to our young friends:

The law department of the University of Dalhousie owes its origin to the munificence of George Munro, of New York, as it does its success to the energy and self-sacrificing spirit of the faculty, who have undertaken to carry the trust into operation. Whether it was the increasing favour with which such schools are regarded, or the crying necessity for higher legal education, or some other reason, that prompted Mr. Munro to devote some \$40,000 to founding the school, we do not know. But of this there can be no doubt—such an institution was greatly needed in the maritime provinces. No man capable of forming a judgment on the question of how best to obtain a complete and thorough knowledge of the law would for one moment recommend any other course than attendance at a law school. The student in a law office seldom receives any instructions from his preceptor. Day after day he goes through the mill-round of posting books, serving notices, copying papers, writing letters, etc. This work is of the most desultory character; in fact too often his studies are conducted without guide, counsel, or friend, and it is only when admitted to the bar that he wakes up to the realities of his situation and finds that all the while he has been under a pleasant delusion, that he has never studied law, knows no law, and must either begin at the beginning or be pushed out of the profession by men who have studied. Determined to give students the inestimable advantages of a thorough training, the founders of the school have spared nothing at their command to make it the most successful in Canada. Already it numbers fifty students and has a library far in advance of many schools twenty years in operation. The school occupies the large rooms in the High School on Brunswick street, that to the right being devoted to a lecture and recitation room, and the one on the left to a library and reading-room. Every one who visits the school is struck by the handsome appearance of the rooms and the neat though simple manner in which they are fitted up. On the tables may be found the leading daily newspapers and the most of the leading law periodicals. The advantages for reading and studying are very great. The library contains about 3,000 volumes, some of which are duplicates, and are to be exchanged with American and Canadian libraries. In legal publications relating to Canada it is hoped to make it complete, and already in this respect it is far ahead of any library in the maritime provinces. The faculty are about to make an appeal to the public to give them such a library as will enable them to take rank with the best American law schools.

Then follow pen and ink sketches of the faculty, consisting of Richard C. Weldon, Principal, and the following lecturers: Hon. J. S. D. Thompson,

## EXAMINATION PAPERS.

Hon. S. L. Shannon, Q.C., James Thompson, Q.C.,  
Robert Sedgwick, Q.C., Wallace Graham, J. Y.  
Payzant, and J. T. Bulmer.

## EXAMINATION QUESTIONS.

MICH. TERM, 1883.

## FIRST INTERMEDIATE.

*Equity.*

(Honours.)

1. Give an illustration of the maxim: *Vigilanti-  
bus non dormientibus, æquitas subvenit.*

2. When will equity grant relief by way of sup-  
porting the defective execution of a power?

3. A. is the owner of a farm and, in ignorance of  
and without inquiry as to the true state of facts, he,  
in the course of a treaty for sale to B., represents  
to the latter that there is a ripe and standing crop  
of fifty acres of wheat on the farm, which will yield  
at least forty bushels to the acre. B., relying  
thereon and without inspection or further inquiry,  
purchases the farm with the crop, and pays for the  
same. There are in fact but twenty-five acres of  
wheat, which yield but twenty bushels to the acre.  
Action is brought by B. to rescind the contract on  
the ground of misrepresentation. A. defends, ask-  
ing that the contract be affirmed, and offering to  
pay the market value for the deficiency in the wheat.  
What are the rights of the parties? Explain fully.

4. The owner of goods places them in the hands  
of an auctioneer for sale. The latter secretly pro-  
cures a friend to buy them in for him at the sale.  
The owner then discovers the fact. What remedies  
has he, if any?

5. A piece of land is conveyed unto and to the  
use of A. to hold in trust for B. The trustee sells  
the land to C. who holds it for ten years. Action  
is then brought by B. against A. for breach of trust  
and against C. for recovery of the land. Both  
defendants rely upon the Statute of Limitations.  
What are the rights of the parties? Explain fully.

6. A. is a blind man, and agrees with B. for the  
purchase of a farm. The contract is signed by A.  
who is then falsely told by B. that the latter has  
also signed it. Action is brought by A. for specific  
performance which is resisted by B., who sets up  
the Statute of Frauds as a defence. What are the  
rights of the parties? Explain fully.

7. A testator devises the revenues arising from  
certain lands to trustees for certain specified objects  
of charity. These revenues so increased that they  
were more than sufficient for the specified objects:  
the testator's heir-at-law brought action against the  
trustees to recover the surplus revenue. What  
were the rights of the parties? Explain fully.

## SECOND INTERMEDIATE.

*Real Property.*

1. What is the present state of the law as to the  
cultivation of wild land being considered waste?

2. How can a freehold estate be made to com-  
mence *in futuro*?

3. What was, and what is now, the meaning of  
the phrase "die without issue" in a will? Explain

4. What was formerly the distinction between a  
tortious and an innocent conveyance? What is the  
law now upon the subject?

5. Is there any case in which land, not being a  
leasehold estate, will descend to the personal repre-  
sentative of an intestate? Explain.

6. Explain the meaning of the rule that powers  
cannot be grafted on a bargain and sale.

7. What is the effect of the intentional destruc-  
tion of a deed with the consent of all parties to it?  
Explain fully.

*Equity.*

1. What is constructive notice? Give two ex-  
amples.

2. A. by voluntary deed conveys Whiteacre to B.  
and by deed for valuable consideration conveys  
Blackacre to C., and each of the conveyances con-  
tains a covenant for further assurance. Action is  
brought by B. against A. to reform the Whiteacre  
deed, on the ground that the land is imperfectly  
described, and action is brought by C. against A.  
to reform the Blackacre deed on the ground that  
by mutual mistake of the parties it conveys only a  
life estate, whereas it was intended to convey a fee.  
What are the rights of the parties to these actions,  
and why?

3. A. holds certain stock in trust for B., who, for  
value, assigns his interest therein to C., who gives  
no notice of the assignment: B. afterwards again  
assigns the same stock to D., a purchaser for value  
without notice of the prior assignment, who gives  
notice of his assignment to C.; and still later B.  
again assigns the same stock to E., a purchaser for  
value without notice of any of the prior assign-  
ments, who gives notice of his assignment to A.  
Upon this state of facts who is entitled to the stock,  
and why?

4. A. enters into a voluntary bond whereby he  
binds himself to convey certain lands to B. or his  
assigns. The latter assigns the bond to C., who is  
a *bona fide* purchaser thereof for value, without  
notice of any want of consideration for the original  
instrument. C. brings action on the bond for  
specific performance thereof, and A. depends on the

## EXAMINATION PAPERS.—CORRESPONDENCE.

fuses to leave the property, and an action being brought to recover possession, sets up his infancy and the invalidity of the conveyance. Who should succeed in the action, and why?

5. A testator bequeaths his household furniture to his widow upon condition that she shall never marry, and in the event of her marrying again it is to go to her servant. Is the condition a valid one? Give reasons.

6. What is the rule in equity as to the right of a solicitor to purchase property from his client during the continuance of the relationship?

7. What was the former rule in equity as to the right of a surety on payment of the debt to receive an assignment of the securities held by the creditor, and how has that rule been modified by statutory provision?

8. Where a right, title or interest in lands is in question in an action, what step can the plaintiff take in order to prevent the land from falling into the hands of an innocent purchaser for value without notice of the plaintiff's rights?

9. Give a short sketch of the law relating to appropriation of payments as between debtor and creditor.

10. Distinguish between the different measures of relief afforded at law and in equity to one of several sureties who is compelled to pay the whole debt, in a case where one of his co-sureties is insolvent.

*Benjamin on Sales, and Smith on Contracts.*

1. Under what circumstances can, and under what circumstances cannot, a vendee who has purchased goods by fraud, transfer them to an innocent purchaser for value, so as to enable such innocent purchaser to hold them as against the original vendor?

2. Define *fructus industriales* and *fructus naturales*; and explain the difference between them as regards the application of the fourth section of the Statute of Frauds.

3. A. sells to B. a certain stack of hay standing on his farm for \$30, the stack to be allowed to remain where it is for one month, and not be removed until paid for. During the month the stack is accidentally burnt before any of it is removed or paid for. Is B. obliged to pay for it? Reasons.

4. When a vendor delivers goods to a common carrier to be sent to the purchaser, is the carrier as a general rule in contemplation of the law the bailee of the vendor, or of the purchaser?

5. What is the effect in regard to the passing of the title, of goods being put by the vendor on board the purchaser's own vessel; and how may that effect be prevented?

6. When may a party rescind a contract of sale on the ground that he has been induced to enter into it by an innocent misrepresentation of fact not amounting to a warranty?

7. Where a purchaser has been induced to buy goods through the fraud of an agent of an innocent vendor, what remedies has the purchaser, and against whom?

8. Explain the difference, as regards the effect upon a sealed contract, between the illegality of part of the consideration and the illegality of some of the covenants.

9. What exceptions are there to the rule that money paid in pursuance of an illegal contract cannot be recovered back?

10. Will evidence of a *parol* admission by a debtor that he has made a payment to his creditor on account of a debt within the statutory period be sufficient to take the case out of the Statute or Limitations? Give reasons.

## CORRESPONDENCE.

## RAIDS ON THE PROFESSION.

To the Editor of the LAW JOURNAL;

SIR,—I beg to call your attention to the fact that in a certain town not more than sixty miles from Toronto, a chemist and druggist has undertaken to practice as a conveyancer, in addition to his ordinary business, and he boastfully informed the writer that he did as much conveyancing as any of the lawyers. Now, why should this state of things exist? If a lawyer undertook to sell and dispense drugs, he would be immediately prosecuted at the instance of the druggist; yet, the latter may with impunity infringe on the business of the former, and even boast of it. How long is this evil to continue? In no other country in the world can every Tom, Dick, or Jim practise this most important branch of the law without being duly qualified. Surely an influential body like the Law Society ought to be strong enough to protect its members against this iniquity.

Yours, very truly,

ONE OF THE INJURED.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

MICHAELMAS TERM, 47 Vict., 1883.

During this term the following gentlemen were entered on the books of the Society as Students-at-Law, namely:—

Graduates—Thomas Francis Lyall, William George Hector McAllister, Charles Joseph McCabe, John Shaw Skinner, Walter Stephen Harrington, Francis Norman Raines.

Matriculants—Donald Reginald Anderson, Edward Peel McNeil, Charles Elliott, Isaac Benson Lucas, William Francis Bannerman, Frederick Bernard Featherstonhaugh, David Stevenson Wallbridge, Frederick Clarence Jarvis, Ira Standish, William Patrick McMahon.

Juniors—Ashman Bridgman, Hugh Crawford Rose, Colin McIntosh, Walter A. Thrasher, David Alexander Dunlop, Francis Brown Denton, Magloire Raoul Routhier, Heber Stuart Warren Livingston, John Alexander Chisholm, Paul Jarvis, Marcus Herbert Simpson, Thomas Scullard, John Harper.

The following gentlemen were called to the Bar, namely:—

George Kappele, honour man and gold medalist; Cornelius Arthur Masten, Robert Alexander Porteous, James Arthur Mulligan, John Soper McKay, William John Taylor, Thomas Chapple, Charles Macdonald, Rufus Adams Coleman, Chauncy Giles Jarvis, Fernando Elwood Titus, Archibald James Reid, Alexander Mackenzie, William Henry Barry, Edwin Bell, William John Wallace, John Johnstone Anderson Weir, James Garbutt, Ferguson James Dunbar.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

## Articled Clerks.

- 1884 and 1885. { Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

## Students-at-Law.

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.  
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar.

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous les toits.

1885—Emile de Bonnechose, Lazare Hoche.

## OR NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

## FIRST INTERMEDIATE.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

## FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

## FOR CALL.

Blackstone, vol. 1, containing the introductions and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

## CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the Society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before each Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each Term at 11 a.m.

8. The First Intermediate examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates, of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchor, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fee .....	\$ 1 00
Student's Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above .....	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

# Canada Law Journal.

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No. 3.

## DIARY FOR FEBRUARY.

- 3. Sun.....*4th Sunday after Epiphany.*
- 4. Mon. ....Hilary sittings of Com. Law Divisions, H. C. J. begins.
- 6. Wed. ....Hagarty, C. J., C. P., sworn in, 1856.
- 9. Sat. ....Queen Victoria married, 1840.
- 10. Sun.....*Septuagesima Sunday.*
- 11. Mon. ....Lord Sydenham Gov.-Gen. of Canada, 1840. R. E. Caron, Lieut.-Gov. Quebec, 1824.

TORONTO, FEB. 1, 1884.

In the case of *McLachlan v. Usborne*, in which Ferguson, J., gave judgment on January 28th, a point was decided of much practical importance to trustees, viz., that the provisions of 40 Vict. c. 8, s. 30, relating to the appointment of new trustees, though it probably would not make valid an otherwise invalid appointment of trustees made prior to its passing, yet it does apply to the appointment of new trustees made by a retiring trustee, who is such under an instrument of prior date to the Act. We believe many appointments of trustees have been made throughout the country, and property has been dealt with in the faith that such is the proper application of 40 Vict. c. 8, s. 30. And the plaintiff in the present case, who acted on a contrary supposition, and paid off a mortgage to one M. as trustee, after M. had assumed to appoint two new trustees in her place under 40 Vict. c. 8, s. 30, refusing to recognize these new trustees as validly appointed, because M. was a trustee under an instrument of prior date to the statute, finds his mistake to his cost, inasmuch as he cannot obtain from the new trustees a discharge of the mortgage, which is held not satisfied as against them.

## DRUGGISTS.

A DRUGGIST, the Supreme Court of Louisiana says, means "one who sells drugs without compounding or preparing them: and so is a more limited term than apothecary." (*State v. Holmes*, 28 La. Ann. 765.)

A commission merchant, dealing principally in alcohol, is not a druggist, within the meaning of the Massachusetts' act, regulating the sale of alcohol by druggists. (*Mills v. Perkins*, 120 Mass. 41); and although whiskey may be sold by druggists in comparatively small quantities as medicine, and doubtless a great many people so take it, still it was held that fifty barrels of whiskey remaining in a bonded warehouse at the time of his death would not pass under the will of a wholesale and retail druggist bequeathing his stock of medical drugs, etc. The court considered fifty barrels of whiskey wholly disproportionate to the ordinary stock of medicine and drugs kept on hand by the testator—too much sack for the bread. (*Klock v. Burger*, 56 Md. 575.) One may be an apothecary or druggist although he does not actually compound his medicines. (*Haniline v. Commonwealth*, 13 Bush. 350.)

In the early days in England the grocers, or poticaries, who formed one of the trade guilds of London, united with their ordinary business the sale of such ointments, simples and medicinal compounds as were then in use. In the days of Henry VIII. the medical department of the grocers' trade being greatly increased shops were established for the exclusive sale of drugs and medicinal, and all kinds of chemical preparations. We have a graphic description of one of these apothecaries about the

## DRUGGISTS.

days of "good Queen Bess," in the words of the prince of English dramatists :

I do remember an apothecary,  
And hereabouts he dwells, which late I noticed  
In tatter'd weeds, with overwhelming brows,  
Culling of simples : meagre were his looks,  
Sharp misery had worn him to the bones,  
And in his needy shop a tortoise hung,  
An alligator stuff'd, and other skins  
Of ill-shaped fishes : and about his shelves  
A beggarly account of empty boxes,  
Green earthen pots, bladders and musty seeds,  
Remnants of pack thread and old cakes of roses  
Were thinly scattered to make up a shew.

ROMEO AND JULIET, Act V., sc. 1.

Until 1868 any person whatever might open what is called a chemist's shop in England, and deal in drugs and provisions. In that year, however, the Pharmacy Act was passed, which prohibits any person engaging in the business of, or assuming the title of chemist and druggist, or dispensing chemicals or drugs, unless he be registered under that Act. And to be registered one must pass an examination in Latin, English, arithmetic, prescriptions, practical dispensing, pharmacy, materia medica, botany and chemistry.

Under the Ontario Act (R.S.O., c. 145), there is a College of Pharmacy, managed by a Pharmaceutical Council, who grant certificates of competency to practice as pharmaceutical chemists, prescribe the subjects on which candidates are to be examined, and arrange for the registration of chemists. No one, save those registered or their employés, is authorized to compound prescriptions of legally authorized medical practitioners. The Act, however, does not apply to medical practitioners. But, save as aforesaid, no one can retail, dispense, or compound poisons, or sell certain articles named, nor assume or use the title of "Chemist and Druggist," or "Chemist," or "Druggist," or "Pharmacist or Apothecary," or "Dispensing Chemist or Druggist," unless he has complied with the Act.

The code Napoleon recognizes two classes of vendors of drugs and medicines, Apothecaries and Druggists. The former, who are assumed to be pharmaceutically educated, are alone allowed to sell compounded medicine, the latter who are classed with grocers are only permitted to sell drugs of a simple character in bulk and at wholesale. (Code of Med. Pol. 332, 33.) In the United States, wherever statistics do not otherwise direct, apothecaries and druggists are not upon the Common Law footing of provision vendors, and may sell in any quantities articles in which they deal.

A druggist is held to a strict accountability in law for any mistake he may make in compounding medicine or selling his drugs. By the Statute law of England it is declared to be the duty of every person using or exercising the art or mystery of an apothecary to prepare with exactness, and to dispense such medicines as may be directed for the sick by any physician. (55 Geo. III., c. 194, 85.) And by the same Act, for the further protection, security, and benefit of George the Third's subjects it was declared, that if any one using the art or mystery of an apothecary should deliberately or negligently, unfaithfully, fraudulently or unduly make, mix, prepare or sell any medicines, as directed by any prescription signed by any licensed physician, such apothecary, in conviction before a Justice of the Peace, unless good cause shown to the contrary, forfeit for the first offence £5, for second, £10, and for third he shall forfeit his certificate. But apart from any statute, whenever a druggist or apothecary (using the words in their general sense) sells a medicine, he impliedly warrants the good quality of the drugs sold ; and besides that, he warrants that it is the article that is required and that it is compounded in every prescription dispensed by him *secundum artem*. Like the provision dealer, the pharmaceu-

## DRUGGISTS.

tist is bound to know that the goods he sells are sound, *i.e.*, competent to perform the mission required of them, and being so presumed to know he warrants their good qualities by the very act of selling them for such. The rule, "Let the buyer beware," does not apply.

In some way Fleet and Simple got cantharides mixed with some snake root and Peruvian bark. Unfortunately Hollenbeck, requiring some of this latter mixture, bought this that these druggists had, took it as a medicine, and in consequence suffered great pain, and had his health permanently impaired. He sued for damages, and recovered a verdict for \$1,140. The defendants asked for a new trial, but the court refused it saying, "Purchasers have to trust to a druggist. It is upon his skill and prudence they must rely. It is his duty to know the properties of his drugs, to be able to distinguish them from one another. It is his duty so to qualify himself, or to employ those who are so qualified to attend to the business of compounding and vending medicines and drugs as that one drug may not be sold for another; and so that when a prescription is presented to be made up the proper medicine and none other be used in mixing and compounding it. The legal maxim should be reversed, instead of *caveat emptor* it should be *caveat vendor*, *i.e.*, let him be certain that he does not sell to a purchaser or send to a patient one thing for another, as arsenic for calomel, cantharides for, or mixed with snake root and Peruvian bark, or even one innocent drug calculated to produce a certain effect in place of another sent for and designed to produce a different effect. If he does these things he cannot escape civil responsibility upon the alleged pretext that it was an accidental or an innocent mistake. We are asked by the defendants' attorneys in their argument, with some emphasis, if druggists are, in

legal estimation, to be regarded as insurers. The answer is, we see no good reason why a vendor of drugs should in his business be entitled to a relaxation of the rule which applies to vendors of provisions, which is, that the vendor undertakes and insures that the article is wholesome. (13 B. Monr. 219.)

It is the duty of the druggist to know whether his drugs are sound or not, and it is no answer to his want of knowledge to say that the buyer had opportunities for inspection, and could judge for himself of the quality of the goods. (Chitty on Contracts, p. 393.)

If a druggist miscompounds a medicine, or intentionally deviates from the formula he commits a tortious act, and if any injury arises to another through his ignorance or neglect he is liable. Even if a physician writes a prescription wrongly it is expected that the druggist should know enough to detect the error, and whether he does so or not he still compounds it at his peril. For one man's negligence or omission of duty is no palliation of another's, and under the doctrine of joint liability the apothecary or druggist who compounds, knowingly or not, a noxious prescription, commits a joint tort with the physician who writes it. (*Howe v. Young*, 16 Ind. 312; 2 Hilliard on Torts, p. 297, sec. A.) And in an action against a druggist for injury through negligence of his clerk in selling sulphate of zinc for Epsom salts, it is no defence to say that the subsequent medical treatment was negligent. (*Brown v. Marshall*, 47 Mich. 576.)

A wholesale druggist is liable in the same way as a retail when he supplies substances notoriously dangerous to health or life, and he impliedly warrants the articles to be as represented by their conventional designation, and if they are not so he is liable for all damages that may ensue from his misrepresentation. (*Rae*

## DRUGGISTS.

*Bracken v. Fondar*, 12 John. 468; *Jones v. Murray*, 3 Monr. 85; *Marshall v. Peck*, 1 Dana, 609.)

If a druggist affixes to a medicine, or drug, a label bearing his name and stating it to have been prepared by him he makes the warrant only more notorious and by so doing (inasmuch as it is an invitation to the public to confide in his representation) is ever after estopped from denying responsibility for any injury which may have arisen out of defects in its quality, or errors in its composition. So long as the label is attached it is an affirmation of the good quality of the article and its correct composition, to every one who relies upon it when buying. But as some articles deteriorate in time, what is said in relation to the liability of the vendor applied only to the articles at the time they leave his hands. He only warrants their good qualities then, but no longer, and his representation affirms that much, and is sincere. (*Ordronaux*, 183-184.) The subject of labels was carefully considered in *Thomas v. Winchester*, 2 Selden 397, N. Y., when *Ruggles C. J.* gave judgment. Mary Ann Thomas was ordered a dose of extract of dandelion, her husband brought what he believed was dandelion from Dr. Foord, druggist and physician; but it was extract of belladonna. The jar was labelled "½ lb. dandelion, prepared by A. Gilbert, No. 108 John St., N. Y.," Foord bought it as dandelion from James S. Aspinwall, druggist, who bought it from defendant, a druggist, 108 John St. Defendant manufactured some drugs and purchased others, but labelled all in the same way. Gilbert was an assistant who had originally owned the business. The extract in the jar had been purchased for another dealer. The two extracts are alike in colour, consistency, smell and taste. Gilbert's labels were paid for by defendant and used in his business with his knowledge and consent. A non-suit

was moved for on the ground that defendant being a remote vendor and there being no privity or connection between him and the plaintiff, the action could not be sustained. Gilbert, the defendant's agent would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely labelled medicine. Every one who by his culpable negligence causes the death of another, although without intent to kill, is guilty of manslaughter. (2 R. s. 662, 319.) This rule applies not only where the death of one is occasioned by the neglectful act of another, but where it is caused by the neglectful omission of a duty by that other (2 Car. & Kir., 368). Although the defendant W. may not be answerable criminally for the neglect of his agent, there can be no doubt as to his liability in a civil action, in which the action of the agent is to be regarded as the act of the principal. The defendant's neglect put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution? or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? (He being a dealer and not a customer.) The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labelled into the market, and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison unlabelled into the hands of Aspinwall as an article of merchandise to be sold, and afterwards used as the extract of dande-

## DRUGGISTS.

lion by some person then unknown. The defendant's contracts of sale to Aspinwall does not excuse the wrong done the plaintiffs. It was part of the means by which the wrong was effected. The plaintiff's injury and their remedy would have stood on the same principal if the defendant given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge under circumstances that would have led to its sale on the faith of the labels."

Ordronaux says (sec. 186). It cannot be denied that had Mrs. Thomas died Foord would, equally with Gilbert, have been guilty of manslaughter, since whether he intended it or no he was doing an unlawful act in dispensing a poison for a salutary medicine. While then it may be proper enough to rely upon labels and warranties of others, in dealing with ordinary substances, still when it comes to articles of a character dangerous to health or life the law will preserve knowledge of their quality in those professionally dealing in them, and exact a degree of skill and care commensurate with the risks incurred. Here it is *caveat venditor*, instead of *caveat emptor*.

In England (in *R. v. Noakes*, 4 F. F. 920) a chemist and druggist was indicted for manslaughter, but was acquitted. The deceased had been in the constant habit of getting aconite and occasionally henbane from Noakes; on this occasion he sent two bottles of his own, one marked, "Henbane, 30 drops at a time." The druggist by mistake put the aconite into the henbane bottle, the dose of thirty drops was taken and the customer was no more. Erle C. J. told the jury that although there might be evidence of negligence sufficient for a civil action still that they could not convict unless there was such a degree of complete negligence as the law meant by the word "felonious," and that in this case he did not think

there was sufficient to warrant that. But Tessymond, a chemist's apprentice, was found guilty of manslaughter for causing the death of an infant by negligently giving to a customer who asked for paregoric, to give to the infant (a child of nine weeks old), a bottle with a paregoric label, but containing laudanum, and recommending a dose of ten drops (1 Lewin c. 169).

One Jones recovered against a chemist and druggist of the name of Fay, £100 for damages, because he, Fay, gave, him blue pills for the painless colic, such physic being improper, (4 F. & F., 525). A man on the advice of a friend went to a drug store for ten cents worth of "black-draught," a comparatively harmless drug, of which he intended to take a small glassful as a dose for diarrhoea. There was evidence given by the clerk who sold the mixture, that at the shop he asked for "black-drops," the defendant, the proprietor told him that that was poison, that the dose was from ten to twelve drops, and advised him to take another mixture, he refused, and the clerk, (by the defendant's direction), gave him two drachms of "black-drops" in a bottle, with a label bearing those two words written upon it, but nothing to indicate the dose, or that it was poison. The man took the bottle home, drank almost all its contents, and died the next morning from the effects of so doing. In an action brought by the representative of the deceased to recover damages for negligent killing by the defendant, it was held that the courts should have submitted to the jury the question as to whether the defendant was not guilty of negligence in failing to place upon the bottle a label shewing that its contents were poisonous and that it erred in non-suiting the plaintiff. Afterwards in giving the judgment of the Court of Appeals, Finch, J., said, "on such a state of facts (as sworn to by the clerk) a verdict against the defendant

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would not be justified. Although no label marked 'poison' was put upon the phial, and granting that by such omission the defendant was guilty of misdemeanour and liable to the penalty of the criminal law (under the statute of the State), still that fact does not make him answerable to the customer injured, or to his representative in case of his death, for either a negligent or wrongful act, when towards that customer he was guilty of neither since he fairly and fully warned him of all and more than could have been made known by the authorized label. . . . If the warning was in truth given, if the deceased was cautioned that the medicine sold was a strong poison, and but ten or twelve drops must be taken, he had all the knowledge and all the warning that the label could have given, and could not disregard it, and then charge the consequences of his own negligent reckless act upon the seller of the poison. But if no such warning was given, its omission was negligence, for the results of which the vendor was liable both at common law and by force of the statute." But the court considered that the clerk being himself the one who had been negligent stood in a position to provoke suspicion, arouse doubt and justify watchful and rigid criticism, and that this joined with the conduct of the deceased developed a question of fact rather than of law, and that the court below was right in saying that the case should have been submitted to the jury. (*Wohlfart v. Becker*, 27 Hun. in Ct. of Appeals, Central L. J., July 20, 1883.)

Under the Ontario Pharmacy Act no one can sell certain poisons named without having the word "Poison," and the name of the article distinctly labelled upon the package; and if the sale is by retail, the name of the proprietor of the establishment where it is sold, and the address must also be on the label. (R. S. O., c. 145, sec. 27.)

In Georgia it was held, that where a druggist in good faith recommended the prescription of another person to the owner of a sick horse, who thereupon ordered him to put it up, and paid for it, the owner had no cause of action because the medicine had injured his horse, as the stuff was properly prepared according to the prescription. (*Ray v. Burbank*, 6 Ga. 505.)

In England chemists and druggists are liable to the heavy penalty of £500 if they sell to brewers or dealers in beer anything to be used as a substitute for malt; they are also liable for adulterating or selling any adulterated medicine, and on a second offence of this kind the name of the offender, his abode, and his crime may be published in the newspapers at his expense. (56 Geo. III. c. 58, s. 3; 31 and 32 Vict. c. 121, s. 24; 23 and 24 Vict. c. 84, 30.)

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

## CHANCERY DIVISION.

Proudfoot, J.]

[January 9.]

PETERBOROUGH REAL ESTATE INVEST-  
MENT Co. v. IRETON.

*Damages—Judgment recovered—Measure of damages—Evidence.*

*Appeal from Master's Report—Measure of damages.*

The Plaintiff's company brought their action on a mortgage against I., the assignee of the Equity of redemption, and claimed damages for making a distress at the request of I., on F. the tenant of the premises, F. having recovered a judgment for \$461.60 against the Co. in respect of such distress. At the hearing, the fact of I. having made such request was found against him and it was referred to the Master at Peterborough to take the usual mortgage

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accounts, and to ascertain what damages the Co. had "properly suffered" by reason of such distress. It appeared that in F.'s action I. had offered the Co.'s solicitor to procure witnesses and assist in the defence, but his offer was not accepted. In the Master's office these witnesses were examined and showed that their evidence would have materially affected the verdict, but the Master held that the verdict obtained was *conclusive evidence* of the measure of damages against I.

*Held*, that in a general indemnity the judgment was, at the most, only *prima facie evidence*, that the ruling of the Master was erroneous, and that the case went back to him to revise his report.

*Hudspeth*, Q.C., for appeal.

*Moss*, Q.C., contra.

Proudfoot, J.]

[January 9.]

COOK V. NOBLE.

*Will—Construction—Executory devise.*

J. C. by his will directed his trustees to divide his real estate equally between his sons then living, when his eldest son should attain the age of twenty-five years, when the share coming to his eldest son was to be conveyed to him, and they were to give him \$2000 to stock the same. In case any of his sons should die before attaining the age of twenty-five years, *without issue*, then the share of the party so dying should be divided equally among the survivors.

J. J. C., the eldest son, died under the age of twenty-five, leaving a widow and infant daughter, having made a will making no devise of real estate, but giving his wife his life insurance, then standing in favour of the C. P. L. & S. Co., and directed that so much of his \$2000 as was necessary be used to redeem the insurance from the Co. and the balance he gave to his wife.

*Held*, that the devise to the eldest son was a devise in fee simple subject to an executory limitation and subject to his dying *under twenty-five and without issue*, and as issue was left in this case, the infant was entitled to the land, subject to her mother's dower.

*Held also*, that the \$2000 was an absolute be-

quest, with a direction as to its application, and that the legatee was entitled to the money regardless of the particular mode of its application.

*H. Cameron*, Q.C., and *McPhillips*, for the plaintiff.

*Cassels*, Q.C., for the executors.

*Hoskin*, Q.C., for the infants defendant.

Proudfoot, J.]

[January 9.]

THE CANADA ATLANTIC RAILWAY COMPANY V. THE CORPORATION OF THE CITY OF OTTAWA, ET AL.

*Municipal Corporation—By-law granting Bonus to Railway—36 Vic. c. 48, O., secs. 248, sub-s. 1, secs. 271-274.*

On Sept. 5th, 1873, the City Council of Ottawa passed a resolution, authorizing the by-law committee to introduce at the next regular meeting of the council a by-law for granting a bonus of \$100,000 of debentures to aid in the construction of a certain railway, now represented by the plaintiffs in this action.

A by-law was accordingly introduced on September 22nd, 1873, read a first time, considered in committee of the whole, reported with an amendment, and the clerk was directed to advertise, pursuant to the statute, 36 Vic. c. 48, O. 1, and the votes of the electors was to take place on October 16th, 1873.

On Sept. 24th, 1873, the by-law was advertised, and on Oct. 16th, 1873, it was voted on by the electors, and carried. On Oct. 20th, 1873, the returns of the election were presented to the council, and the by-law was read a second and third time and carried.

Since, however, under 36 Vic. c. 48, s. 231, sub-s. 3, the by-law could only be taken into consideration by the council after one month from the first publication in the newspaper, at a meeting of the council, on Nov. 5th, 1873, after the necessary time had elapsed, a motion to read the by-law a second and third time was proposed and lost.

The by-law was by its terms to take effect on December 13th, 1873.

On April 7th, 1874, a motion was again made and carried at a meeting of the City Council that the by-law passed by the ratepayers, hav-

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ing been passed by the council previous to the time required by law, the same should be now read a second and third time. In the minutes of the council the by-law referred to was mentioned as having been read a first time on October 20th, 1873, whereas the by-law in question was read a first time on Sept. 22nd, 1873. Moreover the by-law thus voted on by the council was said to come into operation and take effect on Dec. 30th, 1873, whereas, the one voted on by the electors was to take effect on Dec. 13th, 1873.

The work on the railway to which the bonus was to be given, began in August, 1872. In 1874 the contractors became insolvent, and from January, 1874, to February, 1881, no work was done, on which last date a new contract was made by the plaintiffs, under which the road was completed in September, 1882, and in Nov., 1882, a demand was made on the defendants, the City of Ottawa, for the debentures, and refused.

The proceedings for granting the bonus were taken under 36 Vict. c. 48, s. 471-474.

The plaintiffs now brought this action to enforce the by-law, and the delivery to them of the debentures.

*Held*, that the by-law was bad and not in conformity with the statutory provisions, for (1) it was claimed to have been passed on April 7th, 1874, while it purported to take effect on Dec. 30th, 1873, thus not complying with the requirements of sec. 248, sub-s. 1, that the by-law, if not for creating a debt for the purchase of public works, shall name a day in the financial year in which the same is passed, when the by-law shall take effect. (2) The by-law submitted to the electors was to come into force on December 13th, and if it was assumed that the council of 1874 intended to pass that by-law, and made the debentures payable on Dec. 29th, 1893, that was more than twenty years from the day of the by-law taking effect, whereas the statute, sec. 474, requires that the whole of the debt and the obligations to be issued therefor, shall be made payable in twenty years at furthest from the day in which the by-law takes effect. (3) *Quare*, also, whether sec. 236 of the statute does not require the by-law to be passed by the council submitting the same.

*Held*, also, that the fact that the by-law had

not been moved against within a year was immaterial when, as in this case, the invalidity was apparent on the face.

*McCarthy, Q.C., O'Gara, Q.C., and Gormully* for the plaintiffs.

*J. Bethune, Q.C., and McTavish*, for the defendants.

Proudfoot J.]

[January 12.]

### WALLACE V. ORANGEVILLE.

*Injunction—By-law to take vote—Conduct of Plaintiff—Joinder of parties.*

On a motion for an interim injunction to restrain the defendants from paying over the sum of \$1,200 to one A. as the price of a site for a post office, it appeared that the Dominion Government had a sum of money in their estimates for the erection of a post office, on condition that the defendants would provide a site, that a by-law had been submitted to the ratepayers to decide by vote which of two sites (one belonging to A. and the other to the town) was to be selected, and that the plaintiff had taken an active interest in favour of the one belonging to the town. The defendants contended that plaintiff was thus incapacitated from making this application, as he knew the object of the by-law, and that A. and the members of the council should be made parties. The plaintiff denied that he was aware that the payment of the \$1,200 was any part of the by-law, and asserted that the only point to be settled by the vote was the site, and that he thought the Government was to pay for it. The by-law made no mention of the payment of any sum.

*Held*, that the plaintiff was not precluded from making this application, and that *for the purposes of the motion* neither A. nor the members of the council were necessary parties, although they might not, if joined, have been considered improper parties. Interim injunction granted.

*Meyers* for plaintiff.

*McCarthy, Q.C., and Walsh* for defendants.

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[Chan. Div.]

Boyd, C.]

[January 14.]

OMNIUM SECURITIES COMPANY V. RICHARD-  
SON.*Specific performance—Absence of common intention  
—Parol evidence.*

Action for specific performance of an alleged contract for the sale of lands. On June 28th, 1883, the defendant wrote to the plaintiffs, who were mortgagees of the land in question with power of sale: "I have considered the matter of our conversation when you were with me, and have come to the conclusion to offer you \$800 for the property, and then, I doubt, if I am doing justice to myself, because as long as I do not get a customer, the interest and taxes would soon eat up any apparent profit I may see in it." The plaintiffs, in a letter of July 2nd, 1883, replied: "We have your favour of the 28th ult., offering \$800 for the property (describing it). Although the price is much less than the amount due us on foot of our mortgage, we have concluded to accept your offer."

The plaintiffs alleged the contract was to purchase for \$800, payable forthwith. The defendant denied any such agreement to purchase. The evidence showed that at the prior conversation referred to in the letter of June 28th, the defendant was seeking to buy on five or seven years' credit, and the reference to "interest and taxes" in that letter confirmed the defendant's contention that this was what he contemplated.

*Held*, that as the acceptance by the plaintiffs was as of a cash offer, but this was not contemplated by the defendant, who did not intend to make any such offer, the contract could not be specifically enforced, the parties differing in their understanding of it.

A letter containing an offer written "without prejudice" means: "I make you an offer; if you do not accept it, this letter is not to be used against me." But when the offer is accepted the privilege is removed.

*Nesbitt*, for the plaintiff.

*Ross*, for the defendant.

Proudfoot, J.]

[January 17.]

MOOREHOUSE V. BOSTWICK.

*Dissolution of partnership—Assignment of interest  
by one partner to continuing partner—Priority  
of separate and partnership creditors.*

W. J. M. dissolved partnership with L. A. M., and assigned all his interest in the business to him, taking a covenant that he would pay off the creditors of the firm. L. A. M. subsequently became insolvent, and made an assignment of all his estate and effects to the defendant in trust for creditors. L. A. M. never made himself separately or exclusively liable to the creditors of the partnership. Defendant, as such assignee, being about to distribute the estate ratably between both partnership and separate creditors, the plaintiff, a separate creditor, on behalf of himself and the other separate creditors, brought this action to compel the defendant to give priority to the separate creditors, and on a motion for injunction, which was, by consent of counsel, turned into a motion for judgment, it was

*Held*, that the assignment by W. J. M. to L. A. M. of his interest in the business, without the consent of the partnership creditors, or without their agreeing to look to L. A. M. for payment, or his making himself separately liable to pay them, made such business his separate estate, and that his separate creditors are entitled to priority over the partnership creditors; and that only the surplus after payment of the separate creditors goes towards paying the partnership creditors.

*Moss*, Q.C., for plaintiff.

*J. H. Macdonald*, for defendant.

Boyd, C.]

[January 19.]

THE BANK OF TORONTO V. THE COBOURG,  
PETERBOROUGH AND MARMORA R. W.  
Co.*Railway debentures—Negotiable instruments—  
38 Vict. c. 47, O.*

By 38 Vic. c. 47, O., the defendants' railway was authorized to issue \$300,000 of preferential debentures, to be a first charge on all the property of the railway, the holders of which debentures, it was enacted, might, in default

of payment thereof, obtain a foreclosure or sale of the railway by suit in Chancery.

On Feb. 5th, 1875, the directors accordingly passed a by-law enacting that such debentures should be issued in sums of \$1,000, which should be under the seal of the company, and should "be negotiated from time to time as the proceeds thereof shall be required for the purposes of the company by the managing director."

On Feb. 1st, 1876, the railway being in debt to the plaintiffs, delivered to them several of these debentures, as security for such debt.

The debentures were in the following form :

Debenture	No.
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The Cobourg, etc., R. W. Company owes the Bank of Toronto, or order, the sum of \$1,000, payable in ten years from Jan. 1st, 1875, at the Bank of Toronto, in Toronto, with interest at eight per cent. per annum, payable half-yearly, on presentation of the proper coupons hereto attached.

The payment of these debentures being in default, the plaintiffs brought this action for an account of what was due thereunder and payment thereof, or, in default, a sale by the Court of the property of the company.

*Held*, that the debentures were valid, and judgment must go as asked.

Looking at the debentures, they were strictly, on the face of them, negotiable instruments. The fact that they were sealed did not detract from their character, being rather that of promissory notes than of mortgages. Though the Act, 38 Vic. c. 47, O., makes the debentures a charge on all the property, real and personal, of the company, with a right of foreclosure and sale, this is something superinduced upon the security by virtue of the statute.

It would be an entirely retrograde movement to apply to debentures such as these the strict rules of the Common Law relating to deeds, rather than the rules of the law merchant applicable to negotiable securities. But, even if this were not so, the fact that the name, "Bank of Toronto," was not filled in until about the time of delivery to the plaintiffs, did not make the debentures void; and *Hibblewhite v. McMorris*, 6 M. and W. 200, is distinguishable. There the instrument was

delivered in an imperfect form, and was therefore void; here the instrument when handed to the bank was complete in all its parts.

If the law as to deeds applied, it would be that class of cases where deeds have been held good, notwithstanding an alteration or subsequent addition, because, at the time of execution, there was something which could not be ascertained, and was therefore to be filled up afterwards: *Bank of Montreal v. Buller*, 9 Gr. 89. Here, however, there was really no execution, which imports *delivery*, prior to the time when the name was filled up.

The company then, issuing debentures in blank, and handing them to the managing director, who was also secretary and treasurer, to be dealt with by him at his discretion, he was empowered to complete the instruments by the insertion of the obligee's name.

*Held*, also, that inasmuch as it appeared that these debentures were delivered with a view to facilitate the company's operations in getting out and disposing of ore, the main branch of the company's business, this was "for the purposes of the company's business," and so within the meaning of the aforesaid Act and by-law.

*C. Robinson, Q.C., S. H. Blake, Q.C., D. McCarthy, Q.C., C. Moss, Q.C., Reeve and Blackstock*, for the plaintiffs.

*J. Bethune, Q.C., and Marsh*, for the defendants.

Boyd, C.]

[January 19.]

# BEATTY V. THE NORTH-WEST TRANSPORTATION COMPANY (LIMITED).

*Company—Purchase by company effected by preponderating vote of vendor—Rescission of contract—Directors—Trustee and cestui que trust.*

The Board of Directors of a steamship company passed a by-law authorizing the purchase for the company of a certain steamship owned by one of the directorate, and, at a subsequent meeting of the shareholders, this by-law was confirmed, such result being attained by the votes of the director, who owned the steamer, and who was the largest shareholder. Without his, the vendor's, votes, the majority of the votes recorded at the meeting would have

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

rejected the purchase. The evidence showed an entire absence of fraud, or unfair dealing:

*Held*, nevertheless, on action brought by a dissentient shareholder, the purchase of the steamship must be rescinded, for the vendor's threefold character of director, shareholder and vendor necessarily involved a conflict between duty and interest, and the rule of the Court is not to permit a man so circumstanced to hold or exercise the balance of power in the conduct of a company's affairs, to the possible prejudice of any of the shareholders.

That the directors of a company are in a fiduciary capacity is plain beyond doubt, and

*Semble*, that in a case such as this, ratification is required by every individual of the class constituting the cestui que trustent. At all events, when a minority is sought to be bound, the vote must be by a disinterested majority.

Apart from all statutory regulations, the general law applicable to sales of a director's property to a company of which he is a director appears to be this: if the contract is agreed upon by a vote of the directors in which the vendor joins, the transaction will be altogether invalid until the matter has been brought before a general meeting of the shareholders and approved.

*J. Bethune, Q.C.*, and *Marsh*, for the plaintiff.

*Robinson, Q.C.*, and *J. H. Macdonald*, for the defendants.

Boyd, C.]

[January 19.

### CARNEGIE V. FEDERAL BANK.

*Stock Broker—Pledge of Stock—Unauthorized sale by Pledge.*

The plaintiff pledged with the defendants certain shares of bank stock as security for a loan under an agreement in writing, which provided amongst other things, that he was to keep up a cash margin of not less than 10 per cent. above the market price, and authorized the bank, in the event of default, "to sell or dispose of the said security without notice, and to apply the proceeds in liquidation of the said advance."

The plaintiff claimed that before default was made the defendants wrongfully sold his stock

without his knowledge or consent, and that he was entitled to credit for the amount realized and to a return of interest paid and damages for being compelled to give additional security.

The defendants claimed that, although the stock was transferred "backwards and forwards by way of a loan, it was never sold until default made.

*Held*, that if the stock was sold before default made, such sale was *tortious*, and following *Ex p. Dennison* 3 Ves. 552 a *loan* of the stock was a *sale*, and that plaintiff might elect either to claim damages or affirm the sale and claim the proceeds and profits made by the bank, one element of the measure of damages being the highest point of the stock market between the conversion and the default.

*Held* also, that if default was made the defendants were entitled to sell the stock without notice, but only for the purpose of liquidating the advance, and that credit must be given for the proceeds at the time of the sale.

A reference ordered to take an account.

*Moss, Q.C.*, and *J. R. Roaf*, for plaintiff.

*Cattanach* and *Symons*, for defendants.

## LAW STUDENTS' DEPARTMENT.

### EXAMINATION QUESTIONS.

CALL TO THE BAR.

(Equity.)

1. An executor receives money which is supposed to be due from a debtor to the estate, and pays it out to the creditors of the estate. It afterwards turns out that the debt which it was supposed was due to the estate had previously been paid. The supposed debtor brings action against the executor to recover the money, and the executor brings a similar action against the creditor. What are the rights of the parties? Give reasons for answer.

2. Distinguish between the nature of the equitable relief, if any, which will be granted in a case where by accident there is a failure to execute a naked power, and in a case where by accident there is a failure to execute a power coupled with a trust, and illustrate each case by an example.

3. An employer seeks and obtains from the father of one of his clerks a bond guaranteeing the honesty of that clerk. Default is subsequently made in

## EXAMINATION PAPERS.

the condition of the bond, and action is brought to recover the damages sustained. The father defends the action upon the ground that at the time when the bond was given the employer was aware that the clerk had been guilty of former acts of dishonesty in his employment, and did not disclose that fact, of which the father was not aware, and upon the further ground that the employer has not first sought to recover from the clerk. Give your opinion as to the validity of the defences and state reasons.

4. A marriage settlement is made pursuant to ante-nuptial contract, whereby the property of both husband and wife is settled. The husband brings action to rescind the settlement on the ground that the wife fraudulently misrepresented the nature and the value of her property, and thereby induced him to become a party to the settlement. Has he good ground of action? Explain fully.

5. What was the rule in equity as to the right of a vendor to fix a reserved price, or to employ a person to bid for him, at an auction sale, and how has this rule been modified as to real estate by statutory provision?

6. A. enters into a bond to B. conditional to pay the latter \$1,000. A. afterwards comes into equity to set aside the bond on the ground that the only consideration given for the bond was the promise of B. that he would smuggle a certain cargo for A., so as to escape the customs duties, and that he had failed in the undertaking. B. defended, on the ground that such failure was caused by the personal interference and gross negligence of A., and demurs for want of equity. What are the rights of the parties? Explain fully.

7. What is the rule in equity as to the right of a trustee for sale, to purchase the trust estate from his *cestui que trust*, or from himself as representing that *cestui que trust*?

8. What steps must a simple contract creditor take in order to give him a status to maintain an action on his sole account, to set aside a fraudulent conveyance made by his debtor?

9. What is the effect of the Statute 27 Eliz. ch. 4, relating to voluntary conveyances, and in what way has the effect of that statute been modified by the legislation of this Province?

10. Blackacre is worth \$5,000 and Whiteacre is worth \$10,000. The owner mortgages both of them for \$10,000, and then sells Blackacre to A., subject to the mortgage, and Whiteacre to B., subject to the mortgage. The mortgagee, under a power of sale in his mortgage, sells Whiteacre for just sufficient to pay off his mortgage. What remedy has B? Give reasons.

*Real Property and Wills.*

1. When can trustees invest the trust funds in the purchase of real estate? What is the general rule as to the kind of title that they should require when so purchasing?

2. What is the law governing the conduct of a purchaser as to (a) disclosure of advantages; (b) misleading the vendor; (c) concealing facts which increase the vendor's interest in the property?

3. What is the difference between *showing* title and *making* title? Explain fully.

4. What law governs the administration of the personality, and the construction of the will respecting it, of a person dying out of Ontario? What law governs in a like case as to realty?

5. A testator directed land and personalty to be converted into money, and that his debts and legacies should be paid thereout, and the residue he gave to certain legatees. Some of these legatees having died in the testator's lifetime, their legacies lapsed. How are the lapsed shares to be disposed of? Why?

6. Explain descent *per stirpes* and *per capita*, and give instances of each.

7. A. dies intestate, seised of Whiteacre, and leaving a widow and one son (B). The son (B.) dies intestate, seised of Whiteacre, and leaving a widow and one son (C). The grandson (C.) dies intestate, seised of the same land, leaving a widow and children. The three widows being alive, how is dower to be allotted?

8. Land is devised to A. and B. upon certain trusts which they do not desire to be burdened with. What course should they adopt? Explain fully.

9. If a mortgagee buys, at a sale by the sheriff, under an execution, the equity of redemption in the mortgaged lands, what is the result, and what are the rights of the mortgagor thereafter?

10. What is a base fee within the meaning of the Act respecting estates tail?

— — —  
*Harris on Criminal Law.—Broom's Common Law.*  
*Books 3 and 4.—Blackstone, Vol. I.*

1. Explain the nature and effect of the different presumptions as to the criminal capacity of infants of different ages.

2. What constitutes *misprison of Felony*? Explain by example.

3. Give three instances of a man killing another by fighting; one in which the killing is *murder*; another in which it is *manslaughter*; and another in which it is *excusable homicide*.

4. State accurately the rule of the criminal law in reference to the evidence of an accomplice.

## FLOTSAM AND JETSAM.

5. What is the difference between a challenge to the array and a challenge to the polls, on a criminal trial?

6. What is the rule as to charging a prisoner with distinct felonies on different counts of the same indictments, and what exceptions are there to the rule?

7. What is the measure of damages to be recovered under Lord Campbell's Act, for the benefit of members of the family of a person killed by the negligence of another? What should be taken into consideration by the jury in assessing them?

8. If A. buys a horse from B., informing him that it is for his daughter to ride, and relying on B.'s representation that the horse is quiet and safe to ride, which is contrary to the fact, in consequence of which the daughter is thrown and injured, will she have an action against B.?

9. Explain the meaning of the following classes of statutes: *declaratory, remedial, enlarging, and restraining.*

10. What children are considered as natural born subjects of Great Britain, although born in a foreign country?

## FLOTSAM AND JETSAM.

## STATEMENTS BY PRISONERS AND THEIR COUNSEL.

The following letter has appeared in the *Times*:—

SIR,—There seems to be a considerable, though, perhaps, not an unnatural, misapprehension as to the nature and effect of the recent resolution adopted upon the above subject at a meeting of the judges.

So far as I am aware, this resolution is not, nor is it considered to be, binding upon any non-assenting person. It does not profess to be the enactment of a rule of practice, nor a "decision" upon any point of practice or procedure, much less upon any question of substantive law. It is nothing more than a private and purely informal expression of opinion elicited from a certain number of the circuit-going judges as to what the practice had theretofore been, according to their experience. It was not even a declaration of opinion by the judicial body as such, as I shall show in a moment. I was a member of the bench at the time, but I was not present at the meeting, from what cause I have no recollection. I never received any notice of any one's intention to propose such a resolution, nor have I ever to this day received any notice of

such a resolution having been adopted, and I was in entire ignorance of its existence until the fact came to light in the course of the recent discussion that followed the O'Donnell trial. In the meantime, the question had several times arisen before myself; and under the impression that I was acting according to the accepted practice, as it had been laid down by Lord Chief Justice Cockburn, I allowed the prisoner, by the mouth of his counsel, to state his version of the facts to the jury without proof. And, in addition to this, I never refused liberty to a prisoner to make a further statement himself if he desired it.

The truth is, that there is not the slightest foundation for the statement which I have seen published—that the judges have attempted or desired to settle and determine in secret conclave and without public discussion or argument, even so little as a question of practice and procedure; and perhaps the statement scarcely deserves serious contradiction.

For my own part, I own that there seems to be a great practical objection to allowing a prisoner to state through counsel facts that he does not propose to support by evidence. If a prisoner, in his defence, desires to state facts which he is not in a position to support by evidence, he ought to be allowed free scope to do so. He is not permitted by law to give evidence, and it would be most unjust, and even inhuman to restrict him in giving his explanation. But if this explanation, woven, perhaps, skilfully and ingeniously, is presented through the mouth of counsel, this evil consequence immediately follows—that the Court and jury are without any sufficient guarantee that the full, unqualified statement of the prisoner is placed before them, because a cautious and skilful counsel might naturally be expected, as indeed it would be his duty, in framing the defence, to omit whatever might appear to him to amount to damaging admissions or silly and contradictory reasoning. This weak point tends to destroy the moral effect of unproved statements made through the mouth of counsel, a result which, in the case of a really innocent person, may be deplorable. A remarkable instance of this occurred before myself quite recently. In a simple and apparently clear case against the prisoner, the counsel for the defence gave, without offering any proof, an extraordinary explanation of the affair with which the prisoner had furnished him; he did so in a most able and justly-reasoned speech; but it was evident to every one that the explanation thus presented appeared to the jury more plausible and ingenious than probable. The summing up to the jury was concluded, when the prisoner appealed to me to

## FLOTSAM AND JETSAM.

know whether he could say something. I told him, certainly—that if he had anything to tell us that had not already been stated, he was at liberty to mention it to the jury now. He then, in a very simple and artless way, told his story, which was evidently the basis of his instructions to counsel; but there was this important difference—that he frankly admitted an important and apparently damaging fact that had been conclusively established by the prosecution, but strenuously disputed by his counsel. But he told the whole story in such an artless fashion, and with slightly altered circumstances, that he threw an entirely new and unexpected light over the whole affair, and evidently deeply impressed the jury as well as others. Certain of the witnesses were recalled at the instance of the jury, and interrogated respecting the new aspect of the question, with the result that the prisoner, who before his statement stood in decided peril of conviction, was immediately acquitted.

The recent discussion upon this subject seems to have brought to light the fact that it certainly has not been the general practice, when a prisoner has been defended by counsel, for him to be allowed to state without proof, through the mouth of counsel, any facts he may think fit to instruct his counsel to state and the latter may consider it prudent to repeat.

It seems to me almost impossible to dispute that it is and ought to be the right of the prisoner, even when he is defended by counsel, to offer without proof any explanatory statement of his own; and for my own part nothing short of an Act of Parliament will ever induce me to deprive a prisoner of this right whenever he demands it, whether before or after his counsel's speech, or after the summing-up of the judge or even the deliberations of the jury.

I am, your obedient servant,

Beddeglert, Dec. 27. WATKIN WILLIAMS.

The following reply appeared in the same journal:—

Sir,—In his letter to you Mr. Justice Williams says a prisoner "is not permitted by law to give evidence, and it would be most unjust and even inhuman to restrict him in giving his explanation." With submission to his lordship, there seems some confusion here. If "explanation" means explanation of the facts already in evidence with no addition to them, nobody has ever doubted the right of a prisoner to give such explanation. If "explanation" includes placing additional facts before a

jury, as thus, "I explain my knocking down the prosecutor by saying he first knocked me down," then it would be as well to call the thing by its right name. What his lordship really means is this. The prisoner ought to be allowed to state things he cannot prove. What is this but to give evidence, which, however, his lordship expressly says the prisoner himself is not "permitted by law to do." What the prisoner says, his explanation as his lordship calls it, is to influence the jury, or it is not. In the latter case it is idle. If it is to influence it is by the alleged existence of new facts. The result is, the jury will have before them evidence on oath, and which has, or might have been, cross-examined too, and evidence not on oath, and without the wholesome check of cross-examination. His lordship says that nothing but an Act of Parliament will induce him to deprive a prisoner of the right when he demands it. Nothing but an Act of Parliament ought to induce a judge to deprive a man of a right which would otherwise exist. But does this right exist? I say No, and there is no precedent or authority for it, no better reason for it than this—that because a man is not permitted to give evidence with the ordinary securities for its truth, he must be permitted to give it with no security. There is a fine high tone in his lordship's letter; but I would humbly suggest he should take the opinion of the Court of Criminal Appeal as to whether he is right.

Your obedient servant,

B.

## HAMILTON LAW ASSOCIATION.

THE Annual meeting of the Hamilton Law Association was held on the 28th instant. This Association is now a large and influential body consisting of some sixty members, including those who have joined during the past year. The Library was reported to contain some 1,300 volumes. The following officers were re-elected: Messrs. Æ. Irving, Q.C., President; Thos. Robertson, Q.C., Vice-President; A. Bruce, Treasurer; R. R. Waddell, Secretary. The following gentlemen were elected Trustees: Messrs. F. MacKelcan, Q.C., E. Martin, Q.C., G. M. Barton, J. W. Jones and J. V. Teetzel.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

MICHAELMAS TERM, 47 Vict., 1883.

During this term the following gentlemen were entered on the books of the Society as Students-at-Law, namely :—

Graduates—Thomas Francis Lyall, William George Hector McAllister, Charles Joseph McCabe, John Shaw Skinner, Walter Stephen Harrington, Francis Norman Raines.

Matriculants—Donald Reginald Anderson, Edward Peel McNeil, Charles Elliott, Isaac Benson Lucas, William Francis Bannerman, Frederick Bernard Featherstonhaugh, David Stevenson Wallbridge, Frederick Clarence Jarvis, Ira Standish, William Patrick McMahon.

Juniors—Ashman Bridgman, Hugh Crawford Rose, Colin McIntosh, Walter A. Thrasher, David Alexander Dunlop, Francis Brown Denton, Magloire Raoul Routhier, Heber Stuart Warren Livingston, John Alexander Chisholm, Paul Jarvis, Marcus Herbert Simpson, Thomas Scullard, John Harper.

The following gentlemen were called to the Bar, namely :—

George Kappelle, honour man and gold medalist ; Cornelius Arthur Masten, Robert Alexander Porteous, James Arthur Mulligan, John Soper McKay, William John Taylor, Thomas Chapple, Charles Macdonald, Rufus Adams Coleman, Chauncy Giles Jarvis, Fernando Elwood Titus, Archibald James Reid, Alexander Mackenzie, William Henry Barry, Edwin Bell, William John Wallace, John Johnstone Anderson Weir, James Garbutt, Ferguson James Dunbar.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- 1884 and 1885. { Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.  
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic ; Algebra, to end of Quadratic Equations : Euclid, Bb, I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem :—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek :

## FRENCH.

A paper on Grammar.

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous les toits.

1885—Emile de Bonnehose, Lazare Hoche.

## OR NATURAL PHILOSOPHY.

Books—Arnot's elements of Physics, and Somervilles Physical Geography.

## FIRST INTERMEDIATE.

Williams on Real Property, Leith's Edition ; Smith's Manual of Common Law ; Smith's Manual of Equity ; Anson on Contracts ; the Act respecting the Court of Chancery ; the Canadian Statutes relating to Bills of Exchange and Promissory Notes ; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition ; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills ; Snell's Equity ; Broom's Common Law ; Williams on Personal Property ; O'Sullivan's Manual of Gov-

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

## FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

## FOR CALL.

Blackstone, vol. 1, containing the introductions and rights of Persons; Pollock on Contracts, Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

## CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5 The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Thursday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fee .....	\$ 1 00
Student's Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above .....	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

# Canada Law Journal.

VOL. XX.

FEBRUARY 15, 1884.

No. 4.

## DIARY FOR FEBRUARY.

16. Sat.....Hilary sittings of Com. Law Divisions, H. C. J. ends.
17. Sun.....*Sexagesima Sunday*. William Osgoode, first C. J. of U. C., died 1844.
18. Mon.....Maritime Court Act came into force, 1878.
19. Tue.....Supreme Court Session begins.
21. Thur.....Divisional Court sittings, Chan. Div. H. C. J. begin.
24. Sun.....*Quinquagesima Sunday*.
26. Tue.....Sir John Colborne, administrator, 1838.
27. Wed.....Ash Wednesday.
28. Thur.....Indian Mutiny began, 1837.

TORONTO, FEB. 15, 1884.

"JOHN BULL ET SON ÎLE" is probably as brilliant, and at the same time good-natured a satire, as has ever been written about the "right little, tight little island," and the inhabitants thereof. Amongst other things, solicitor's bills of costs come under the notice of Mossos, who instances the following:—

- |   |     |
|---|-----|
| 1. To receiving a letter from you s. d.                               |     |
| and reading it .....  | 3 6 |
| 2. To writing the answer.....   | 3 6 |
| 3. To hiring a cab.....   | 5 0 |
| 4. To thinking of your affair in the cab .....                        | 3 6 |
| 5. To listening to your remarks ....                                  | 3 6 |
| 6. To answering them .....  | 3 6 |
| 7. To meeting your father-in-law and speaking to him of your affair.. | 3 6 |

But after all it is hard to beat the old story of the client who was bathing at the seaside, and suddenly saw the head of his solicitor emerge from the water. "Oh, I say, Mr. Gammon," he exclaimed, "how's my case getting on?" "Excellently, excellently," was the reply; and down dived Mr. Gammon again, and among the crowd of bathers eluded any further attempts of his client to question him. Later on, however, the unfortunate client found duly set out in his bill of costs:—

- |  |     |
|--|-----|
| To conferring with you at the sea- s. d. |     |
| side on your case .....                  | 5 0 |

WE find in Osgoode Hall Library a bright little infant in the shape of the *Manitoba Law Journal*, vol. 1, no. 1, of which Mr. John S. Ewart is the editor.

*Cælum non animum mutant qui trans mare currunt,*

says Horace, and the sentiment would appear to be equally true of those who cross the prairie as of those who cross the sea. At all events, our indefatigable friend, Mr. Ewart, is "at it again," and the latest evidence of his literary industry is a most creditable production, and deserves success. "Married Women," who engross so much of every lawyer's time, are the first attendants at the birth of this little stranger. "Professional Morality" naturally follows in the wake of these virtuous matrons, while "Important Decisions" must necessarily be expected at an early period in every baby's life, and are not absent in this case. On the whole, we feel quite justified in prophesying a useful maturity and a happy old age to the *Manitoba Law Journal*.

THE judges of the land will bear us witness that we have never let an opportunity pass of entering our protest against the penny-wise and pound-foolish policy of the Government (here speaking of both sides in politics) in paying inadequate salaries to those holding judicial positions. It is just as well, however, that the judges should understand that the profession have not that intense sympathy with them that they possibly suppose, and this for a very good reason. As a rule, when a member of the Bar becomes a member of the Bench he entirely forgets that he

## RECENT ENGLISH DECISIONS.

once eloquently depicted the wrongs of brethren "below" in the matter of fees and emoluments, and their hard usage at the hands of invaders and plunderers of the profession. He now not only forgets his former wrongs (which are *still* the wrongs of those who are left behind), but assists in yet further curtailing their fees, or at least takes care that these are not increased—though the cost of living is doubled. When alterations in a tariff are proposed reasonable items are objected to, though very probably had the judge still been in the ranks he would have been foremost to urge their allowance; or when he could help the struggling practitioner in country places by taking a firm stand in the matter of appointing commissioners for taking affidavits, and in other ways, he practically plays into the hands of those he once looked upon as his worst enemies. We are glad to know that some of our most hard-working judges are exceptions; the profession know and appreciate their steadfastness, and wish that *their* salaries at least were twice as large. The moral is, let the judges do their duty by the profession and the latter will be more inclined to lend a hand towards obtaining proper salaries for the judiciary. One cannot be expected to feel very enthusiastic about another who stands by and sees one robbed. This view has probably not been brought prominently before their lordships, and it is therefore only fair to do so now, and to let them know that we have merely put in mild language that which is the common talk of numbers of thoughtful men in the profession who hold the judges responsible for much of the injustice which we are now suffering.

## RECENT ENGLISH DECISIONS.

The numbers of the "Law Reports," for December 1st, comprise 8 App. Cas., pp. 777-913; 11 Q. B. D., pp. 625-782; 8 P. D., pp. 205-229; 24 Ch. D., pp. 253-744.

## WILL—"SPECIFIC LEGACY"—RESIDUARY BEQUEST.

In the first of these, the only case requiring special notice here, is *Robertson v. Broadbent*, p. 812. The House of Lords there decides that a bequest by a testator, after giving certain pecuniary legacies of "all my personal estate and effects of which I shall die possessed, and which shall not consist of money or securities for money" to R., followed by a bequest of the residue of his personal estate to trustees, amounted, in the words of Blackburn, J., to "one residuary bequest to two persons." In other words, they held that the bequest to R. was not a specific legacy, and was accordingly not exempt from the payment of the pecuniary legacies. The judgments afford the following carefully expressed definition of a specific legacy, given by Lord Selborne, L. C., and approved of by Lords Blackburn and Fitzgerald, that it is "something which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate."

## COPYRIGHT—"AUTHOR" OF PHOTOGRAPH.

In the Queen's Bench cases, *Nottage v. Jackson*, at p. 627, raises the curious question of who is entitled to register as the "author of a photograph" within the meaning of the English Copyright Act. The conclusion come to by the full court, is that a firm of photographers who sent one of their employees to take a photograph, could not register themselves and claim a copyright as the authors. The

## RECENT ENGLISH DECISIONS.

Court incline to hold that the person who takes the negative is the "author" of the photograph; and also that two or more persons may be registered under the Acts as the "authors" of a painting, drawing, or photograph, and they refer to, but do not decide, the question which thereupon arises as to whether, in such a case, the copyright would subsist for the joint lives of the authors, and seven years afterwards, or for the lives and life of the survivors and survivor, and seven years afterwards. Bowen, L. J., makes at p. 656, the following striking remarks: "It is to be remarked that this Act of Parliament treats photography as a fine art. It puts it on a level, for the purpose of registration, with paintings and drawings. In order to see who is the author of a photograph one must consider the question on the assumption that photography is to be treated, for the purpose of the Act, as such fine art. I think it is evidently not the man who pays—not the man who contributes the machinery—not the man who does nothing except form the idea—not the man who does nothing towards embodying the idea—not the man who finances the expedition, or who sends it out—none of those persons, in the ordinary sense of the term, can be considered the artist."

## WRITTEN CONTRACT—SIGNATURE BY AGENT—PAROL EVIDENCE.

At p. 651, in *Young v. Schuler*, a contract had been signed by one S., holding a power of attorney from one of the parties to the contract, and it was sought to adduce evidence of contemporaneous statements of S., which, if admissible, made it clear that he intended to sign in his own right, as well as for his principal, and that he intended to be bound. The Court of Appeal upheld the admission of the evidence, as it did not contradict the written instrument. Grove, J., the judge of first instance observes:—"There being ambig-

uity in the contract as to the capacity in which S. signed, evidence as to what he said at the time as to the capacity is admissible."

## DISTRESS BY LANDLORD AFTER TENANT HAS QUIT.

In *Gray v. Stait*, p. 668, the full Court decide that a landlord cannot follow and distrain his tenant's goods which have been fraudulently removed to prevent a distress for rent due, if at the time of the distress the tenant's interest in the demised premises has come to an end, and he is no longer in possession. The short judgment of Cotton, L. J., gives in a few words the grounds of the decision:—"The statute 11 Geo. 2, c. 19, s. 1, gives a power of distress over goods fraudulently removed off the premises only where they would have been distrainable if they had remained upon the premises. The power to distrain after the expiration of a tenancy is conferred by 8 Anne c. 14, s. 6; but this power is limited by certain conditions contained in s. 7. In order to justify a distress, it is clear to me that there must be a possession either wrongful or rightful; in the present case there was no possession of the demised premises at the time of the seizure."

## MALICIOUS PROSECUTION—PETITION TO WIND UP COMPANY—INJURY TO CREDIT.

The next case, the *Quartz Hill Consolidated Gold Mining Company v. Eyre*, p. 674, decides the interesting question of whether, and when, an action will lie for falsely and maliciously, and without reasonable or probable cause, presenting a petition under the Companies Acts to wind up a trading company. The M. R. and Bowen, L. J., agree in their reasoning and conclusions. The latter says:—"The first question to be considered is whether an action will lie for falsely and maliciously presenting a petition to wind up a company; and the second is whether an action will lie without further proof of

## DRUGGISTS.

special damage than was presented to the judge in this case." No pecuniary loss, or special damage in the usual sense, had been proved. After an elaborate judgment he answers these questions thus, at p. 693:—"I think that the action will lie, for the reason that special damage is involved in the very institution of the proceedings (which *ex hypothesi* are unjust and without reasonable or probable cause), for the purpose of winding up a going company." He explains his meaning to be that no petition to wind up a company can be presented and advertised in the newspapers without striking a blow at its credit. He shows that in this respect presenting such a petition differs from bringing an ordinary action, as to which he says:—"It seems to me that no mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action for malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of proceedings in the action, may do a man an injury; but the bringing of the action is of itself no injury to him. \* \* Therefore the broad canon is true, that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution. \* \* It is unnecessary to say that there could not be an action of that kind in the past, and it is unnecessary to say that there may not be such an action in the future, although it cannot be found at the present day. The counsel for the plaintiff com-

pany have argued this case with great ability; but they cannot point to a single instance since Westminster Hall began to be the seat of justice in which an ordinary action, similar to the actions of the present day, has been considered to justify a subsequent action on the ground that it was brought maliciously and without reasonable and probable cause."

## BREACH OF COVENANT FOR QUIET ENJOYMENT—DEED OF LAND.

The next case of *Howard v. Maitland*, p. 695, is an interesting decision on the question of what amounts to a breach of a covenant for quiet enjoyment. In a conveyance of land by the defendant to the plaintiff, the defendant covenanted for title and quiet enjoyment notwithstanding any act or thing done or suffered by him, or by any of his ancestors or predecessors in title. After a conveyance a decree was made in a suit in Chancery in which the plaintiff, though not a party, was represented as being one of a class of persons against whom the suit was brought, and by the decree the land so conveyed by the defendant was declared to be subject to a general right of common over it. The Court of Appeal held that the decree alone, without any entry or actual disturbance of the plaintiff in his possession, was no breach of the defendant's covenant for quiet enjoyment. The M. R. says at p. 701:—"I adopt that which is laid down in 1 Shepard's Touchstone, p. 171—'And in all cases where any person hath title the covenant is not broken until some entry or other actual disturbance be made upon his title.' It is clear that there was no entry here, and it seems to me that there was no actual disturbance even supposing that a decree against the plaintiff would be an actual disturbance."

## EASEMENT—RIGHT OF WAY—CONTINUOUS ENJOYMENT.

The case of *Hollins v. Verney*, at p. 715, raises the question what is such a continuous enjoyment of a right of way for

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twenty years, as will satisfy the Prescription Act, Imp. 2-3 Will. 4 c. 71, s. 2 (R. S. O. c. 108, sec. 35). The easement claimed was to carry along a way the wood which happened to be cut upon a particular slope near this way, and it appeared that the wood was cut from time to time at intervals which were not very clearly ascertained, the whole wood being cleared at three cuttings, of three several years. It was also proved that the last exercise of this supposed right was within the proper period, that is to say, just before the commencement of the action, and that the last previous cutting of the wood had been fifteen years before that, and within twenty years. The cutting previous to that had been more than twenty years before action, and so could not be included in the twenty years enjoyment. The full court held there had not been an uninterrupted enjoyment of the way for twenty years, within the meaning of the Act, which did not apply to so discontinuous an easement as that claimed. All the judges declare it established law that in order to bring a case within the section of the act, there must be proof of an actual enjoyment and exercise of the right claimed, during the first of the twenty years which are material, whereas in this case during the first year the way in question was never used. Accordingly the court refused to accept the argument of the defendant, who claimed the easement, that although the right had not been actually enjoyed or used for the prescribed period, yet it might subsist without being actually exercised, and if it had been exercised from time to time partly before and partly after the period of twenty years had begun to run, that this would be a sufficient enjoyment to satisfy the statute.

## WILL—EXECUTOR ACCORDING TO THE TENOR.

Among the Probate Cases only one seems to call for special notice, viz.: *In*

*the goods of William Bradley, deceased*, p. 215. There a testator by his will said: "I appoint R. H. P. and J. E. W.," but did not state in what capacity he appointed them. He also bequeathed legacies to "each of my executors," and gave his "said executors" the residue of his property, with certain directions as to it. Sir. James Hannen now held that by the will R. H. P. and J. E. W. were appointed executors, and granted probate to them accordingly. He said—"The words of the will show that the testator meant to appoint R. H. P. and J. E. W. to something, and the inference I draw is that he intended to appoint them as executors."

A. H. F. L.

A SOLICITOR at Hamilton, a member of a well-known firm, has sent us the following circular which he complains was sent by the firm which has signed it to one of his clients, a creditor of the insurance company named therein. Our correspondent evidently is smarting under what he supposes a gross breach of professional etiquette; and were we sure that he is justified in the view he takes we would publish not only the circular, but the names of the solicitors at the foot. We presume, however, that the Master had nominated the firm in question to represent the creditors, under G. O. Chy. 218, and that this is the real explanation. The following is the circular in question:—

TORONTO, 26th JAN., 1884.

DEAR SIR,—We are solicitors for creditors under the Order of Reference to the Master of the Supreme Court at Hamilton for the winding up of the Standard Fire Insurance Company.

Claims have been placed in our hands to the amount of more than \$25,000, several of which are admitted and some disputed.

We have received from the secretary a list of claims for fire losses and your name appears on it as a claimant for \$3,000.

We think it of importance to proceed with expedition with the reference to ascertain the liabilities of the company and to promote a call on the

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stockholders, by order of the court, for the payment of debts.

It is probable that an Insolvent Act will be passed during the present session of Parliament and we fear a large number of the stockholders will not be able to pay the call which will be required and might take the benefit of our Insolvent Law.

Please advise us when your fire loss happened—whether your claim has been admitted or disputed—and if your claim is disputed whether you propose to have the question of liability of the company decided by the master of the Supreme Court at Hamilton in a summary manner and at comparatively small expense, or whether you propose to apply to the Court for leave to proceed to trial in the courts.

We will be pleased on application by you to furnish any information in our power to enable you to judge of the state of affairs of the company and of the propriety of the course to be pursued.

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### ONTARIO.

#### MUNICIPAL CASES.

##### RE THOMSON AND MCQUAY.

*Ditches and Water-courses Act, 1883—Inferior owner—Remedy against superior owner.*

An inferior owner cannot invoke the aid of the Ditches and Water-courses Act to compel a superior owner to construct a ditch across the former's land. He is left to the common law remedies, or he may construct the ditch himself, and call in the township engineer to say in what proportion, if any, the other owner or owners should contribute towards its cost.

[Whitby, 1883.]

This was an appeal from the award of the township engineer made in pursuance of 46 Vict. ch. 27.

The arbitration in effect found that McQuay, being the owner of part of lot 8 in the 3rd concession of Pickering, constructed a tile drain thereon, leading in a south-westerly direction to the side road between lots 8 and 9, and across such road by a long established culvert, which side road and culvert furnished him with a sufficient, proper and lawful out-

let without requiring to trespass on the lands of Thomson (lot 9) therefor. That McQuay has placed the drain with a view to the most natural drainage of the land, and that the culvert appears to have been the original water-course. That the water flowing from lot 8 would, by natural drainage, flow, by reason of the existing slope, into lot 9, and it is not necessary to go upon lot 9 in order to secure an outlet to the drain.

Thomson's requisition to McQuay required him "to construct a drain through lot number 9 or such part thereof as will carry off the water from your part of lot 8 under the Ditches and Water-courses Act of 1883." Failing an agreement the township engineer was notified and evidence was given before him upon which he made his award, the operative words of which are "the construction of the drain asked for by the requisition is left entirely to Thomson."

He fixed his own costs at \$17 and directed them to be paid by Thomson, but made no provision for any other costs.

Thomson appealed from this award on the ground that it was "contrary to law and evidence, and in no way decides the matter in dispute, nor does it provide a remedy for Thomson from the water that illegally drains unto Thomson's land."

*W. H. Billings* appeared for the appellant, and cited *McGillivray v. Millin*, 27 U.C.R. 62; *Murray v. Dawson*, 19 C.P. 314; *Murray v. Dawson*, 17 C.P. 588; *Darby v. Crowland*, 38 U.C.R. 338.

*J. E. Farewell* for the respondent, cited *Kerr on Injunction*, 390; *Heward v. Banks*, 2 Burrs. 1114; *Smith v. Kendrick*, 7 C.B. 573.

*DARTNELL, J. J.*—I have carefully read and analyzed the evidence taken before the engineer. It has been fully and skilfully taken, and justifies the findings of fact in the award, which is very well drawn up. It in effect finds that to construct the drain asked for by the requisition would be entirely for Thomson's benefit. It remains for me to consider what is the full effect of this finding.

Mr. Billings relies upon the cases cited by him, as shewing that his client had no other forum in which he could assert his rights.

I do not think on examination of these cases

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that they bear out his contention. *Murray v. Dawson* (1st case) simply decided that an award under the Fence Viewers' Act (C. S. U. C. ch. 57) cannot be sued upon, but must be enforced in the manner pointed out by the Act. The second case of the same name was an action brought against the defendant for wrongfully obstructing the plaintiff's drain, and would be applicable to this case only if McQuay had been the plaintiff, and Thomson the defendant. It was there held that the penning back of the natural surface flow of water is not actionable, and that the plaintiff's remedy was under the Fence Viewers' Act. That Act was only applicable where it is the "joint interest of owners to construct a ditch." Now, in this case Thomson's contention is that he has no interest whatever in the drainage of McQuay's land, and yet he invokes the aid of these proceedings to compel him to carry off the water so as not to injure his land.

I do not think the Act has superseded his Common Law remedies.

The Corporation of Pickering could stop up or obstruct the culvert in question, and so I take it could Thomson himself; and McQuay could have no remedy, as "the right of drainage does not exist *jure natura*": *Darby v. Crowland*, 38 U.C.R. 343; *Crewson v. The Grand Trunk Ry.*, 27 U.C.R. 68. If his complaint is, as it appears to be, that McQuay, by means of this ditch, carried to and projected on the applicants land more surface water than otherwise it would have received, he has his remedy at law in an action for damages or for an injunction, or both: *Perdue v. Chinguacousy*, 25 U.C.R. 61; *Rowe v. Rochester*, 22 C.P. 319, and 29 U.C.R. 590; *Stonehouse v. Enniskillen*, 32 U.C.R. 562.

In *McGillivray v. McMillin* the defendant was the inferior owner, and the action was for obstructing a drain, just the reverse of the present case. I do not see how any of the cases cited by Mr. Billings apply.

*Smith v. Kendrick*, 7 C. B. 575, decides that it is the duty of the owner working on the lower level to guard against the water flowing upon him by banking or otherwise.

An examination of the form B. given in the schedule will throw some light upon the scope and meaning of the Act.\* It reads: "I require to construct a ditch or drain through said (my)

lot and find it necessary to continue same through your lands." Nothing can be more different from the requisition served in this case.

Thomson, in his evidence, asserts that his land does not require drainage, and that a drain will be an injury to him rather than a benefit, and yet he asks McQuay to construct a drain across his land (Thomson's), the costs to be borne by McQuay. I think this is turning the Act, so to speak, upside down, and that he has mistaken his *forum*. He is bound to receive McQuay's natural surface water, being the inferior owner. If McQuay has collected in one place more than such natural surface water, and discharged it upon Thomson's land he has a right either to erect an obstruction to divert such overflow, or he can bring an action for damages or for an injunction. If he desires to invoke the aid of this Act, I think his only course would be to build a drain across his own land, and call upon the township engineer to ascertain whether McQuay was benefited by its construction, and if so, in what proportion he should contribute towards its cost.

As the effect of my judgment is that the matter in question does not come within the provision of the "Ditches and Water-courses Act" my finding is practically that the township engineer had no jurisdiction to entertain the matter.

I have had some hesitation as to whether I should set aside the award *in toto*, but as I do not disagree with its findings, have concluded to confirm it. The engineer has omitted to provide for the costs of the Division Court clerk and of the respondent's witnesses. I therefore amend the award by directing "that the costs of the engineer, according to the tariff provided by by-law, and of the Division Court clerk and bailiff, and of the respondent and his witnesses be taxed on the Division Court scale by the clerk of the 2nd Division Court and paid by the appellant to the respondent forthwith after taxation."

In the event of non-payment the respondent can collect these costs under the machinery provided by the Act, or sue for them in the ordinary way, as he may be advised. I express no opinion as to which is the proper course.

The recent case of *Northwood v. The Corporation of Raleigh*, 3 O.R. 347, I think confirms the views that I have taken of the law

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THOMAS V. TURNER.

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## GENERAL SESSIONS—COUNTY OF BRANT.

(Reported by B. F. Fitch, Esq., Barrister-at-law.)

## THOMAS V. TURNER.

*Municipal Act, 1873, sec. 495, sub-sec. 3—Imperial Act, 50 Geo. 3 cap. 41, sec. 6—Hawkers and petty chapmen.*

An agent of a grocer doing business in London went from house to house in Brantford taking orders for tea, and the goods were delivered by J., another agent. The police magistrate fined J. for an infraction of the by-law passed by the city council under the Municipal Act. On an appeal to the General Sessions it was

*Held*, that it was an infraction of the by-law to thus deal without a license. The Provincial Act differs from the Imperial Act in not containing the words "exposing for sale." *Rex v. McKnight*, 10 B. & C. 734, held therefore not to be applicable.

[Brantford, 1883.]

The Municipal Act, 1883, sec. 495, sub-sec. 3, provides that councils may pass by-laws "for licensing, regulating and governing hawkers or petty chapmen, and other persons carrying on petty trades, or who go from place to place or to other men's houses, on foot or with any animal bearing or drawing any goods, wares, or merchandise for sale, or in or with any boat, vessel, or other craft, or otherwise carrying goods, wares, or merchandise for sale, and for fixing the sum to be paid for a license for exercising such calling within the county, city or town, and the time the license shall be in force."

The Imperial Act, 50 Geo. III. chap. 41, sec. 6 is as follows:—"There shall be paid to His Majesty the rates and duties following, viz.: By every hawker, pedlar, petty chapman, and every other trading person going from town to town, or to other men's houses, and travelling either on foot or with horses, or otherwise carrying to sell or exposing to sale any goods, a duty of \$4 for each year."

The appellant was convicted by the Police Magistrate of the city of Brantford for a breach of the city by-law No. 342, to prevent pedlars and hawkers from exercising their calling within the city without a license, and a

fine of \$10 and costs was imposed on the appellant for the breach of the by-law.

From this conviction the appellant appealed to the December General Sessions of the Peace, when the appeal was heard before His Honour Judge Jones without a jury.

*Smyth*, for the appellant, relied on *Rex v. McKnight*, 10 B. & C. 734.

*Wilkes*, for the respondent.

JONES, Co. J.—The by-law was passed on the 18th June, 1883, and follows the words of the statute, Municipal Act, 1883, 46 Vict. sec. 495, sub-sec. 3.

The case of *Rex v. McKnight* has been cited on the part of the appellant as being a case in point with the facts as shown by the evidence in the present case. That case was decided under the English Act, 50 Geo. III. ch. 41, sec. 6.

The facts as to the manner in which the sale in that case was made are very similar to those in the present case, so that if the English Act and ours are the same the above decision would seem to be in point, and would decide the present case. There, as here, the orders for the sales were first taken, and after that the party who was fined for not having a license delivered the goods and received the pay therefor.

The Court there held that such a sale was not one that under the statute required the seller to have a license as a hawker and pedlar, and the Court remarked that there was "no exposing to sale" of the goods sold, such as there would be had the defendant taken the goods with him in the first instance instead of taking orders and afterwards supplying the goods.

Our statute, however, does not contain the words in the English Act "exposing to sale," and the city by-law was apparently framed also to meet a case like the present when there was not an exposing of goods for sale, and it prohibits making sales by taking orders by samples or otherwise.

I therefore think that the defendant has committed a breach of the by-law in question, and of our statute under which the by-law was framed, and was liable to be committed therefor. The evil that was intended to be guarded against by the statute and by-law exists just the same in the case where the goods are sold by first taking orders by samples and then

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going around and delivering the goods and receiving the payment therefor as if the transaction was all completed at the one time. It would seem to be merely an evasion of the requirements of the statute which provides that a license shall be obtained. The seller has the advantage over the local trader by not having to pay rent or taxes, or in any other way assisting to bear the municipal burdens that the shop-keeper has to sustain. Besides this, the public are exposed to the evil of irresponsible persons from a distance going from house to house, very usually with inferior goods which are bought very generally by those who are inexperienced in business matters and while the head of the family may be absent from home.

#### FIRST DIVISION COURT OF YORK.

##### BARBER V. BINGHAM.

###### *Division Court Rules—No power to add Defendants.*

The plaintiff brought an action against one of two copartners upon a promissory note made in the firm name for a partnership debt. The partner not joined was within the jurisdiction at time action commenced.

*Held*, that under the rules of the Division Court there was no authority to add the partner not sued.

*Held* also, that the adding of a defendant was not a principle of practice of the Courts of Common Law, and not a case for the exercise of the Judge's discretion. *Building and Loan v. Heimrod*, 19 C. L. J. 254 followed, and rules of Judicature Act held not in force in the Division Court.

[Toronto, October 24, 1883.]

McDOUGALL, J. J.—For the reasons expressed in my former judgment in *Building and Loan Co. v. Heimrod*, *ante*, I do not think that the rules of the Judicature Act apply "*ex terminis*" to the practice in the Division Court; consequently in this case the application at the trial to add a defendant must be refused or granted upon the authority of Division Court rules, acts, and practice. Now there is no express authority in the rules anywhere given to a judge to add a defendant, although there is an express rule dealing with the question of adding additional plaintiffs (Rule 111). There is express power given to strike out the name of one or more of several de-

fendants (Rules 112 and 113); and by Rule 115, a person appearing at the hearing, and admitting that he is the person whom the plaintiff intended to charge, may have his name substituted for the defendant if the plaintiff consents; but none of these rules covers the case of a plaintiff who has sued too few in number (as in this case one member of a copartnership), and who asks leave to add the name of the party omitted as a defendant. The very fact that these various rules cover so many special difficulties likely to arise in the joinder of proper parties, renders stronger the argument that it was never intended to allow a plaintiff the relief asked for in this case, and that it was a case designedly left unprovided for, for reasons satisfactory to the framers of the rules. In this view of the effect and spirit of the rules which are so elastic in so many ways, I think I would be usurping the functions of the Legislature, or of the Board of County Judges, did I allow a new practice upon such an important point under any discretionary power conferred by section 244 of the Act. Besides, this power to add defendants was not a principle of practice of the Superior Court of Common Law until after the passing of the Judicature Act.

I must, therefore, nonsuit the plaintiff for not joining the partner of the present defendant, who has been proved to have been within the jurisdiction of the Court at the time this action was commenced. The present defendant will be entitled to his costs.

#### NOTES OF CANADIAN CASES.

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#### SUPREME COURT.

##### SHIELDS V. PEAK.

*Judgment on demurrer appealable—Supreme Court Amendment Act, 1879, sec. 3, 38 Vict. cap. 16, sec. 136—Construction of—Purchase of goods by insolvent outside of Dominion of Canada—Pleadings.*

The action was commenced by P., and other merchants carrying on business in England to

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recover \$4,000 on the common counts from J. S., and other merchants, resident and domiciled in Canada, carrying on business in Toronto, and who were traders within the Insolvent Act of 1875, and had obtained a discharge in insolvency after assignment made under that Act.

The plaintiffs in their declaration charge that a purchase of goods was made by the defendants from them on the 13th March, 1879, and another purchase on the 29th March, of the same year, that when the defendants made the said purchases, they had probable cause for believing themselves to be unable to meet their engagements, and concealed the fact from the plaintiffs, thereby becoming their creditors with intent to defraud the plaintiffs, and sought to bring the defendants within the purview of sec. 136 of the Insolvent Act of 1875.

The defendant J. S. (appellant), amongst other pleas, pleaded, as a fifth plea, that the contract out of which the alleged cause of action arose, was made in England and not in Canada. To this plea plaintiffs demurred, and one of the matters of law to be argued was: "The fact of the contract being made in England does not exempt the defendant from liability under the provisions of the Insolvent Act of 1875 in this action." Issue was joined in the other pleas.

*Held* (TASCHEREAU, and GWYNNE, J. J. dissenting), that, although the judgment appealed from was a decision on a demurrer to part of the action only, it is a final judgment in a judicial proceeding within the meaning of the 3rd. section of the Supreme Court Amendment Act of 1879 (*Chevalier v. Cu villier*, 4 S.C.R. 605 followed).

*Per* RITCHIE, C. J., and FOURNIER, J. (1) That sec. 136 of the Insolvent Act of 1875 was *intra vires* of the Parliament of Canada.

(2) That the charge of fraud in the present suit is merely a proceeding to enforce payment of a debt under a law relating to bankruptcy and insolvency, over which subject matter the Parliament of Canada has power to legislate.

(3) That although the fraudulent act charged was committed in another country beyond the territorial jurisdiction of the courts in Canada, the defendant was not exempt for that reason from liability under the provisions

of the 136 section of the Insolvent Act, 1875. and therefore the plea demurred to was bad.

*Per* GWYNNE, J.—That as the said fifth plea confesses the debt for which the action is brought, and that such debt was incurred under circumstances of fraud, and offers no matter whatever of avoidance, or in bar of the action, that the said plea is bad and therefore if the appeal be entertained it must be dismissed.

*Per* STRONG, HENRY, and TASCHEREAU, JJ.—There being nothing either in the language or object of section 136 of the Insolvent Act to warrant the implication that it was to have any effect out of Canada, it must be held not to extend to the purchase of goods in England by defendant stated in the second count of the declaration.

The Court being equally divided the appeal was dismissed without costs.

*Bethune*, Q.C., for appellant.

*Ross*, Q.C., for respondent.

#### MERCHANTS' BANK v. SMITH.

*Warehouse Receipts*, 35 *Vict. c. 5* (D).

The appellants discounted for a trading firm, on the understanding that a quantity of coal purchased by the firm should be consigned to them, and that they would transfer to the firm the bills of lading, and should receive from one of the members of the firm his receipt as a wharfinger and warehouseman for the coal, as having been deposited by them, to which they assented; the following warehouse receipt was given:—

"Received in store in Big Coal House warehouse at Toronto, from Merchants' Bank of Canada (at Toronto), fourteen hundred and fifty-eight (1458) tons stove coal, and two hundred and sixty-one tons chestnut coal, per schooners 'Dundee,' 'Jessie Drummond,' 'Gold Hunter,' and 'Annie Mulvey,' to be delivered to the order of the said Merchants' Bank to be endorsed hereon. This is to be regarded as a receipt under the provisions of Statute 34 *Vict. ch. 5*; value \$7,000,000. The said coal in sheds facing Esplanade is separate from and will be kept separate and distinguishable from other coal.

"Dated 10th August, 1878. (sd.) W. Snarr."

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[Sup. Ct.

The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvents, and filed a bill impeaching the validity of the receipt. The Chancellor who tried the case found that the receipt given was a valid receipt within the provisions of the Banking Act, and was given by a warehouseman, and that the bank was entitled to hold all the coal in store of the description named in the receipt. This judgment was reversed by the Court of Appeal for Ontario, and on appeal to the Supreme Court of Canada it was

*Held*, reversing the judgment of the Court of Appeal,

1. That it is not necessary to the validity of the claim of a bank under a warehouse receipt that the receipt should reach the hands of the bank by indorsement, and that the receipt given by W. S. in this case was a receipt within the meaning of 34 Vict. ch. 5 (D).

2. (RITCHIE, C. J. and STRONG, J. dissenting) that the finding of the Chancellor as to the fact of W. Snarr being a person authorized by the statute to give the receipt in question, should not have been reversed as there was evidence that W. S. was a wharfinger and warehouseman.

3. *Per* FOURNIER, HENRY and TASCHEREAU, JJ.—That the provisions of 34 Vict. ch. 5 (D), as to warehouse receipts do not invade the functions of the Provincial Legislature by an interference with property and civil rights in the Province.

C. Robinson, Q.C., for appellants.

MacLennan, for respondent.

## GLOUCESTER ELECTION PETITION.

### COMMEAU V. BURNS.

*Appeal on Election Petition—The Supreme and Exchequer Court Amendment Act of 1879, sec. 10—Construction of Rule Nisi by petitioners to rescind order of a judge in Chambers made absolute by Court in banc not a preliminary objection.*

A petition was duly filed and presented by appellant on the 5th August, 1882, under the "Dominion Controverted Elections Act, 1874," against the return of respondent. Preliminary objections were filed by respondent, and before

the same came on for hearing the attorney and agent of respondent applied to, and obtained on the 13th October, from Mr. Justice Weldon, an order authorizing the withdrawal of the deposit money and removal of the petition off the files. This money was withdrawn, but shortly afterwards in January, 1883, appellant, alleging he had had no knowledge of the proceedings taken by his agent and attorney, obtained upon summons a second order from Mr. Justice Weldon rescinding his prior order of 13th October, 1882, and directing that upon the appellant re-paying to the clerk of the court, the amount of the security in petition be restored, and that the appellant be at liberty to proceed against the order appealed to the Supreme Court of New Brunswick, and the Court gave judgment rescinding Mr. Justice Weldon's order made in January, 1883. Thereupon petitioner appealed to the Supreme Court of Canada.

*Held*, that the judgment appealed from is not a judgment on a preliminary objection within the meaning of 42 Vict. ch. 39, sec. 10, and therefore not appealable.

Dickie and Woodworth followed.

Blair, Q.C., for appellant.

R. Harrison, for respondent.

## WORTHINGTON ET AL V. MACDONALD.

### *Articles of partnership, Construction of—Estimatio facit venditionem.*

This was an appeal from a judgment of the Court of Appeal for Ontario decreeing that the respondent was entitled to be credited in the winding up of the partnership between respondent and appellant with the sum of \$40,000, the estimated value of certain plant, etc., used in the construction of the works done by the partnership. The article in the deed of partnership executed before a notary public in the Province of Quebec, under which the respondent claimed to be entitled to the said credit of \$40,000, is as follows:—

"The stock of the said partnership consists of the whole of the plant, tools, horses, and appliances now, and for the construction of said works, by the said party of the first part; also all quarries, steam tugs, scows; and also all the rights in said quarries that are held by

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[Ct. Ap.]

the said party of the first part, or any of them, the whole of which is valued at forty thousand dollars, and is contained in an inventory thereof thereunto annexed for reference after having been signed for identification by the said parties and notary, but, whereas the said plant, tools, horses and appliances, steam tugs, scows, quarries and other items had been heretofore sold by the said party of the first part to the firm of Morland & Watson, of the city of Montreal, hardware merchants, to secure them certain claims which they had against said A. P. Macdonald & Co. for money used in the construction of the works referred to, to the extent and sum of twenty-four thousand dollars and interest; and whereas the said James Worthington has paid said amount of twenty-four thousand dollars and redeemed said plant, tools, horses and appliances, and quarries, steam tugs and scows, etc., and now stands proprietor of the same under a deed of conveyance; it is hereby well agreed and understood that the said plant, tools, horses and appliances that are or may be put on the said work shall be and continue to be the entire property of the said James Worthington, until such time as he shall have realized and received out of the business and profits of the present partnership a sum sufficient to reimburse him of the said sum of \$24,000, and interest so advanced by him as aforesaid, as also any other sum or advances and interest which shall or may be paid or advanced to the present firm or partnership, after which time and event the whole of the said stock shall become the property of the said firm of 'James Worthington & Company'; that is to say: the one half shall revert to and belong to the party of the first part, and the other half to the said party of the second part, as the said James Worthington has a full half interest in this contract and all its profits, losses and liabilities, and the said A. P. Macdonald, W. E. Macdonald, and Randolph Macdonald, parties of the second part, jointly and severally, the other half interest in the same."

There was evidence that the plant had cost originally \$57,000, and that it was valued in the inventory at \$40,000 at the request of the appellant; it was also shown and admitted that the profits of the business were sufficient to reimburse the appellant of the sum of \$24,000

and other moneys advanced, and that there was still a large balance to the credit of the partnership.

*Held*, That the plant, etc., furnished by the respondent having been inventoried and valued in the articles of partnership at \$40,000 the respondent had thereby become a creditor of the partnership for the said sum of \$40,000, but as it appeared by the said articles of partnership that the said plant was subject at the time to a lien of \$24,000, and that said lien had been paid off with the partnership moneys, the respondent was only entitled to be credited, as a creditor of the partnership with the sum of \$16,000, being the difference between the sum paid by the partnership to redeem the plant and the value at which it had been estimated by both parties in the articles of partnership. *Estimatio facit venditionem*.

C. Robinson, Q.C., and Metcalf, for appellant.

McCarthy, Q.C., and Cameron, Q.C., for respondent.

## COURT OF APPEAL.

### BAILEY V. JELLETT.

*Trustee and cestui que trust—Solicitor and client—  
Deposit of client's money to credit of solicitor—  
Appropriation of payments.*

The plaintiff placed in the hands of one J., a practising solicitor, a mortgage together with a discharge thereof duly executed for the purpose of enabling J. to receive payment of the amount due under the mortgage, which it was arranged, between the plaintiff and J. in the presence of the local manager of a bank of which J. was the solicitor, should be deposited by the solicitor in such bank to the credit of the plaintiff, and a deposit receipt obtained therefor, which J. should transmit to the plaintiff. J. did receive the money, amounting with interest, to \$6,500, which he deposited in the bank to his private account. About ten days afterwards he drew upon his account for \$3,000 which he deposited to the credit of the plaintiff, obtained a deposit receipt therefor in favour of the plaintiff and transmitted the same to the plaintiff on the 26th August, 1881, telling the plaintiff in his letter that "the balance will be sent next

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week." He drew upon the fund and died, without rendering any account, on the 4th of September following.

*Held*, that the bank was not affected with notice of the money so deposited, being trust moneys, so as to render the bank liable for J.'s misappropriation thereof.

After the deposit of the plaintiff's money, J. recovered a sum of \$1,182.95 for the defendant S. as her solicitor, which he also deposited in the same account on the 24th of August, 1881. Up to the time of J.'s death the amount at his credit always exceeded the amount deposited by him for S.

*Held*, that all the moneys so deposited by J. were impressed with a trust and might be followed; but (in this reversing the judgment of the Court below), as between the plaintiff and S., that S. had a first charge upon the sum at the credit of J. for the full amount of her deposit, and that the balance was applicable to the discharge of the plaintiff's demand.

The bank claimed the right to charge against the account, in priority to the claim of the plaintiff and S., checks and notes of J. presented on maturing after notice to the bank of J.'s death.

*Held*, that they could not do so, and, in consequence of having made such claim, both in this Court and the Court below they were refused their costs.

#### McEWAN V. McLEOD.

*Consent reference—C. L. P. Act, sec. 205—Damages.*

The judgment of the Court below, 46 U. C. R. 235, affirmed—Cameron, J., dissenting as to the quantum of damages.

*J. K. Kerr, Q. C., for appeal.*

*Bethune, Q. C., contra.*

#### PETERKIN V. McFARLANE.

*Notice—Mortgage, etc.*

The Court being equally divided, the appeal and the judgment of the Court below, 17 C. L. J. 244, affirmed with costs.

*Moss, Q. C., and Scane, for appeal.*

*Atkinson and W. Cassels, contra.*

#### RE MURRAY, PURDHAM V. MURRAY.

*Gift inter vivos—Trustee.*

The widow of a testator claimed as a gift from her husband a promissory note payable to his order, but not endorsed by him. The evidence, in the Master's office, on taking the accounts of the estate, shewed that the wife had had possession of this and other notes belonging to her husband during his lifetime. The Master at London found that under the circumstances appearing in the report of the case, 29 Gr. 443, that the testator had intended the note to belong to the widow, and did not form part of the assets of the estate, which finding was reversed by the court.

*Held* [reversing the order then pronounced], that the evidence established a valid gift *inter vivos*.

*Per* BURTON and PATTERSON, J.J.A. The testator under the circumstances had constituted himself a trustee of his wife of the note.

*Moss, Q.C., for appellant.*

*W. Cassels, contra.*

#### CHANCERY DIVISION.

Proudfoot J.]

[Nov. 9, 1883.]

#### RE WINSTANLEY V. CARRICK.

*Will—Construction—Estate tail—Restraint on alienation—Vendor and Purchaser Act.*

A testator devised as follows:—

"The freehold property I hold at present in Jarvis street, in this city, to be divided in two lots from Jarvis street, the lot with the house to be given to M. L., to hold for her benefit during her natural life, and to dispose of the same by will and testament only, the remaining lot, thirty-five feet wide, in Jarvis street, running through to Mutual street, I bequeath to my daughter E. R., and that she shall not dispose of the same only by will and testament, and if either of my said daughters shall depart this life without leaving issue then, and in such case the survivor shall be possessed of the share of the deceased sister."

*Held*, that "dying without failure of issue," meant an indefinite failure of issue, and E. R. took an estate tail, and the condition against disposing of the property except by will and

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testament is a valid condition and not repugnant and void.

The rule is well known that a condition prohibiting alienation attached to an estate in fee, in tail, or for life is void. But if the condition does not take away the whole power of alienation substantially it is good. The alienation may be restricted by prohibiting it to a particular class of alienation, or by prohibiting it to a particular class of individuals, or by restricting it to a particular time.

J. H. Macdonald, for the vendor.

Miller, for the purchaser.

Boyd C.]

[Jan. 14.]

THOMPSON ET AL. V. CANADA FIRE AND  
MARINE INS. CO. ET AL.

*Company—Directors—Fraudulent transfer of  
shares to man of straw—Acquiescence—Laches.*

When the shareholders of a certain company brought an action against the company and certain of its directors, and alleged that the said directors being a majority of the directorate had negotiated a transfer of a number of shares to one C., knowing C. to be a man of no sufficient means to pay calls thereon, in order to escape liability for certain impending calls, and claimed that the said directors should make good to them the amount of calls due upon the shares so transferred to C., and unpaid by him; and the said directors alleged acquiescence and laches on the part of the plaintiff in respect of the matters complained of; and the plaintiff proved the transfer as alleged.

*Held*, that the action of the said directors was a breach of their duty, and invalid, except so far as it was subsequently ratified by the plaintiffs, as shareholders.

Speaking generally, if any shareholder was aware of the transaction by which C. obtained the transfer complained of, and became manager of the company, and allowed the affairs of the company to be managed by him thereafter, taking the chance of prosperity attending his conduct of the business, then that "passive acquiescence" (to use Lord Cranworth's expression in *Spackman v. Evans*, L. R. 3 H. L., 193) would preclude such a shareholder from afterwards contesting the validity of

the transfer; but it was not the duty of the shareholders to investigate as to the action of the directors, and they had the right to say that the facts, if not communicated, were concealed from them. On the other hand, if they meant to dissent effectually from what was being illegally done, the shareholders were bound to take active measures to prevent or undo it.

J. Bethune, Q.C., Mackelcan, Q.C., and C. Moss, Q.C., for the plaintiffs.

D. McCarthy, Q.C., Laidlaw and Teetsel, for the defendants.

Ferguson, J.]

[Jan. 26.]

SHANAGAN V. SHANAGAN.

*Conveyance void for improvidence—Compensation  
for improvements under—Amounts.*

On Aug. 30th, 1875, the plaintiff conveyed a certain farm to the defendants, his sons. On the same day the defendants leased the farm to the plaintiff for the term of his natural life, reserving no rent. On Sept. 23rd, 1875, the plaintiff leased to the defendants the said farm for the term of his (the plaintiff's) life, reserving a rent of \$100 a year, and "the proper board and clothing, and lodging" of the plaintiff, "so long as he remains on the said premises."

The defendants went into possession of the farm, on which the plaintiff also continued to dwell.

Now, in this present action, the plaintiff succeeded in having the grant of Aug. 30th, 1875, and the lease of Sept. 23rd, 1875, declared void, and directed to be delivered up to be cancelled.

The defendants had meanwhile erected a new house on the farm, and made sundry improvements.

*Held*, that the defendants were entitled to be paid all sums of money laid out in improvements, and repairs of a permanent and substantial nature by which the present value of the farm was improved, with interest from the time these sums were actually disbursed; also to be paid the moneys paid by them to keep down the interest of a certain mortgage, which has existed on the farm ever since the date of the original sale to the plaintiff, and any principal moneys thereof which they may have

[Prac.]

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[Prac.]

paid; also rents paid the plaintiff, and the value of such maintenance as had been given by them to the plaintiff. On the other hand the defendants must be charged with deteriorations to be set off against improvements, and with rents and profits of all kinds received by them and also with an occupation rent for the premises occupied by them.

Reference directed to the Master to take the account; and further directions reserved.

### PRACTICE.

Divl Ct. Ch. Div.]

[Dec. 13, 1883.]

#### WELLS V. CARRALL.

*Jurisdiction of Master in Chambers—Absconding Debtors' Act.*

The Master in Chambers made an order under R. S. O. c. 68, s. 59, referring it to the County Court Judge to ascertain the amount due by an absconding debtor. Judgment was entered pursuant thereto (after judgment entered). Another creditor then obtained an order from the Master setting aside the judgment, and allowing him to defend.

*Held*, on appeal that the Master in Chambers has no jurisdiction to set aside such a judgment.

On appeal the Divisional Court upheld the order of *PROUDFOOT, J.*; but the relief sought for was granted on terms.

*W. Cassels, Q.C., and Holman*, for appeal.

*Aylesworth*, contra.

Ferguson, J.]

[Jan. 24.]

#### STANDARD BANK V. WELLS.

*Appeal from Master in Chambers—Time—Rules 14 and 80, O. J. A.—Special Endorsement.*

Appeal from the order of the Master in Chambers allowing judgment to be entered for the plaintiffs under Rule 80, O. J. A. Objection to the appeal that it was not brought on within eight days from the decision of the Master, as required by Rule 414, O. J. A., and that there was nothing to extend the time.

It appeared that *Proudfoot, J.*, had, upon the *ex parte* application of counsel for the defendant for leave to bring on the appeal on Thursday, the 17th January, directed the appeal to be set down

for Monday, the 21st January, the order appealed from having been pronounced on the 11th January, and that no order had been taken out as evidencing this leave.

*Held*, that the application not having been to extend the time beyond the eight days, and the judge having, for the convenience of the court, given leave to bring on the appeal for a day after the expiry of the eight days, the objection should not prevail.

Objection overruled. Upon the appeal it appeared: That the writ was endorsed specially for \$910, the amount of a bill of exchange. The endorsement, however, went on and claimed other relief by asking to have certain conveyances and assignments set aside as fraudulent, etc.

*Held*, that an order cannot be made for judgment under Rule 80, O. J. A., except in an action where the plaintiffs merely seeks to recover a debt or liquidated demand in money.

Appeal allowed with costs.

*Hoyles*, for appeal.

*Cassels, Q.C., contra.*

Mr. Dalton, Q.C.]

[Jan. 28.]

#### MONTEITH V. WALSH.

*Defence—Set off—Striking out.*

Motion to strike out a defence of set off in an action of trespass for entering the warehouse of a deceased person (of whom the plaintiff is the administrator) after his death, and taking and converting the goods therein. The set off was of a debt due by the deceased to the defendant. An administration order had been made, of which the defendant had notice before defence.

The defence of set off was held bad under 29 Vict. c. 28, sec. 28, and also because of the administration order.

*MacGregor*, for the plaintiff.

*Walter Barwick*, for the defendant.

Galt, J.]

[Jan. 29.]

#### DOERR V. RAND.

*Security for costs—Praecipe order—Setting aside.*

The order of the Master in Chambers of the 14th January, 1884, *ante* p. 33, affirmed with costs.

*Cameron and MacPhillips*, for the plaintiff.

*A. B. Cox*, for the defendant.

Prac.]

NOTES OF CANADIAN CASES—EXAMINATION PAPERS.

Wilson, C. J.]

NEALD V. CORKINDALE: FOSTER,  
THIRD PARTY.*County Court action—Third Party—Trial of issues between defendant and third party—Investigating accounts beyond pecuniary jurisdiction of County Court—Prohibition.*

An action in a County Court on a promissory note made by the defendant, in which the defendant claimed indemnity against the third party. The third party having appeared, the learned Judge of the County Court directed certain issues to be tried between the defendant and the third party. At the trial he found for the plaintiff, and investigated accounts between the defendant and the third party amounting to more than \$10,000 upon which he found that a balance of more than \$3,000 would be payable to the defendant; and he directed that the third party should, out of this balance, pay to the defendant the amount of the plaintiff's claim. On a motion for a prohibition,

*Held*, that the order directing the issues between the defendant and the third party, and the proceedings taken under it, were right.

*Held* also, that as the only relief which could be given to the defendant against the third party was protection against the demand of the plaintiff, which was within the pecuniary jurisdiction of the County Court, the learned Judge was not acting beyond his jurisdiction in investigating accounts of sums beyond his jurisdiction.

*J. H. Macdonald*, for the motion.

*McMichael*, Q.C., and *Ogden*, contra.

## SECOND DIVISION COURT COUNTY ONTARIO.

Div. Ct.]

[Feb. 4.]

LAWSON V. LAWSON.

*Estoppel—Exemption.*

*Per DARTNELL, J. J.*—A judgment debtor, who has been examined as such, and who then swore that he had no chattels, or any interest in such, is estopped from afterwards making

claim to a joint interest in certain farm implements.

Chattels jointly owned, or held in partnership, are not exempt from seizure and sale under an execution against one of such joint owners or partners.

## LAW STUDENTS' DEPARTMENT.

### EXAMINATION QUESTIONS.

*Pollock on Contracts.—Byles on Bills.—Best on Evidence.*

1. Point out as accurately as you can the tests of cases in which a corporation will be bound by a contract not under seal.
2. Compare our contracts under seal with the formal contracts of the Roman Law.
3. Explain the words "*unlawful intention*" in the rule: "If the unlawful intention is at the date of the agreement common to both parties to it, the agreement is void."
4. Define warranty. Discuss its applicability or inapplicability to the law that a buyer has a right to expect a merchantable article answering the description in the contract of purchase.
5. Is a verbal acceptance of an inland bill of exchange binding, and why? Give a brief sketch of any changes in the law on the subject.
6. What peculiarity is there as to the law of consideration as applied to promissory notes? In how far is partial failure of considerations a defence?
7. Mention the different kinds of *presumptions* in relation to the disposal of matters of fact by Courts giving examples of them.
8. What was the common law rule as to the admissibility of the evidence of a wife on the part of her husband, and what changes have been made in the law in that respect?
9. Write short notes on the rule of practice which prohibits *leading questions*.
10. Point out the practice (a) where plaintiff makes default in delivery of statement of claim, and (b) where defendant makes default in delivery of statement of defence.

## EXAMINATION PAPERS—CORRESPONDENCE.

*Pollock, Best, Byles, etc.*

(Honours.)

1. Discuss the liability on a contract of a minor who represents himself as of full age.
2. Write a short history of varying opinions as to the effect of contracts of a lunatic.
3. Where a difference of local laws is in question, how is the lawfulness of a contract to be determined? Answer fully, stating exceptions.
4. What must be shewn with regard to a representation relied on by the party misled by it for rescinding a contract? Answer fully.
5. "The rules of evidence are generally the same in civil and criminal proceedings." Mention exceptions.
6. Mention and exemplify the different forms of proof of handwriting by resemblance.
7. Where several persons are proved to have combined to effect an illegal purpose, indicate the extent to which the acts or sayings of one may be used in evidence against another of them.
8. Explain accurately the maxim, *Res judicata pro veritate accipitur*.
9. A foreign bill of exchange falls due and is dishonoured at a place in or near to which there is no notary. What is necessary to be done? Answer fully, indicating cases in which protest is excused.
10. What is the effect on the rights of a defendant of pleading payment into Court, and paying in an amount and denying at the same time the whole debt sued for? Answer as fully as you can.

## CORRESPONDENCE.

## UNLICENSED CONVEYANCERS.

*To the Editor of the LAW JOURNAL:*

SIR,—The unlicensed conveyancer flourishes more powerfully than ever in the country districts, in spite of our long continued efforts to suppress him—and the unhappy practitioner is slowly but surely starving.

For your enduring advocacy you have earned our gratitude—while the Legislature has treated us famously from a fear of losing popularity—and while the benchers have remained, with one or two

exceptions, inert—you have not been ashamed to raise your voice against an evil that is ruining our profession, and degrading its members. When the Mahon Bank failure caused a flutter in financial circles, the Dominion Government, to protect innocent depositors, passed an Act compelling private bankers to add the word "unincorporated" to their advertisements and signs; would it not also be in the interest of the public to compel every unprofessional conveyancer to have attached to his card, and to every instrument prepared by him, the word "unlicensed," to show persons that in employing him they do it at their peril? If the Government will not even do *this*, then we should not be compelled to pay such an unreasonable amount for our annual certificates. In my town the Division Court clerk does an enormous conveyancing business, and does not confine himself to that either but is, to all intents and purposes, a solicitor aided and abetted by the Government which should suppress him, and by a firm of city solicitors of high standing, so high indeed, that they can, and do act unprofessionally with impunity. Thanking you for your continued support, and trusting that the matter will not be permitted to rest until some measure of relief and justice is obtained,

I am,

Yours respectfully,

RED TAPE.

## CONVEYANCING EXTRAORDINARY.

*To the Editor of the LAW JOURNAL:*

DEAR SIR,—The following specimen of conveyancing came under my observation the other day. The genius who drew up the instrument is to be found in the Georgian Bay region. It was a mortgage from a married woman—she was made a party of the first part, the husband was made a party of the second part. The property, was her separate property; all through she was the mortgagor, the husband not being joined.

The richest part is where the conveyancer comes to deal with the printed part of the dower clause: he strikes out "wife" and substitutes "husband," and makes the clause say that "the said party of the second part, husband of the said party of the first part hereby bars *his* dower in the said lands."

The mortgage has been assigned; the assignee

## EXAMINATION PAPERS—LATEST ADDITION TO OSGOODE HALL LIBRARY.

now wants to sell the mortgage. The person to whom it is offered has been with it to me for advice. You propounded a conundrum the other day; I hereby submit another: "How much is this mortgage worth assuming the face of it to be \$1000?"

Yours,

SOLICITOR.

[The subject of dower seems to be one which has exercised the mind of the unlicensed conveyancer considerably of late—our readers may remember a case quite "on all fours" with the above on which we recently commented; and a short time ago we came upon an interesting extension of the commonly received doctrine as to the wife's estate of dower, in a conveyance by two executors under a power of sale given them by the will, worthy farmers both, whose wives had been compelled to journey to town for the important purpose of barring *their* "dower in the said lands."—ED. L. J.]

### LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

Benjamin's Treatise on the Law of Sale of Personal Property, 4th Am., from the 3rd Eng. ed. 2 Vols. 1883.

Cases decided on the British North America Act, 1867, in the Privy Council, the Supreme Court of Canada, and the Provincial Courts, by John R. Cartwright, Vol. 2; Toronto, 1883.

The Judicial Interpretation of Common Words and Phrases, by Irving Browne; San Francisco, 1883.

Handbook of Roman Law, by Dr. Ferdinand Mackeldy; translated and edited by Moses A. Dropsie, from the 14th German ed. 2 Vols. in one; Philadelphia, 1883.

Commentaries on the Law of Statutory Crimes; including the Written Laws and their Interpretation in General. What is special to the Criminal Law; and Special Statutory Offences as to both Law and Procedure; by Joel Prentiss Bishop, 2nd ed.; Boston, 1883.

A Concordance of Words and Phrases Construed in the Judicial Reports, and of Legal Definitions contained Therein, by John D. Lawson; St. Louis, 1883.

Appleton's Annual Cyclopædia and Register of Important Events for the Year 1882; new Series, Vol. 7; New York, 1883.

The Practice at Law, in Equity, and in Special Proceedings in all the Courts of Record in the State of New York, by William Watt, Vol. 7; Albany, 1880.

The Laws of the State of New York relating to Railroads, with cases decided under and applicable to the Sections, also an Index to Records filed in the office of the Secretary of State relating to Railroad Corporations, 1883, by a Councillor at Law; Albany, 1883.

Are Legislatures Parliaments? A Study and Review, by F. Taylor; Montreal, 1879.

A Practical Treatise on the Law of Absconding Debtors, as Administered in the Province of Ontario, with Forms, by James S. Sinclair, Q.C., Judge of the County Court at Hamilton; Toronto, 1883.

The Consolidated Municipal Act, 1883, with Index, by George Bell; Toronto, 1883.

The Law of the Federal Judiciary: a Treatise on the Provisions of the Constitution, the Laws of Congress, and the Judicial Decisions Relating to the Jurisdiction of, and Practice and Pleading in, the Federal Courts, by Samuel T. Spear; New York, 1883.

Story's Conflict of Laws, 8th ed., by M. M. Bigelow; Boston, 1883.

The American Citizens' Manual, Governments (National, State, and Local), the Electorate, the Civil Service, the Functions of Government (State and Federal), by Worthington C. Ford; New York, 1883.

Lefroy and Cassels' Notes of Practice Cases, Being Notes of Decisions and Dicta (England and Canadian) illustrative of the Ontario Judicature Act and Orders, subsequent to Annotated Editions of the said Act up to July 1, 1883, by A. H. F. Lefroy, and R. S. Cassels, Barristers-at-law; Toronto, 1883.

A Treatise on the Criminal Law, by Francis Wharton, L.L.D.; 8th edition, in two volumes; Philadelphia, 1880.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

MICHAELMAS TERM, 47 Vict., 1883.

During this term the following gentlemen were entered on the books of the Society as Students-at-Law, namely :—

Graduates—Thomas Francis Lyall, William George Hector McAllister, Charles Joseph McCabe, John Shaw Skinner, Walter Stephen Harrington, Francis Norman Raines.

Matriculants—Donald Reginald Anderson, Edward Peel McNeil, Charles Elliott, Isaac Benson Lucas, William Francis Bannerman, Frederick Bernard Featherstonhaugh, David Stevenson Wallbridge, Frederick Clarence Jarvis, Ira Standish, William Patrick McMahon.

Juniors—Ashman Bridgman, Hugh Crawford Rose, Colin McIntosh, Walter A. Thrasher, David Alexander Dunlop, Francis Brown Denton, Magloire Raoul Routhier, Heber Stuart Warren Livingston, John Alexander Chisholm, Paul Jarvis, Marcus Herbert Simpson, Thomas Scullard, John Harper.

The following gentlemen were called to the Bar, namely :—

George Kappeler, honour man and gold medalist ; Cornelius Arthur Masten, Robert Alexander Porteous, James Arthur Mulligan, John Soper McKay, William John Taylor, Thomas Chapple, Charles Macdonald, Rufus Adams Coleman, Chauncy Giles Jarvis, Fernando Elwood Titus, Archibald James Reid, Alexander Mackenzie, William Henry Barry, Edwin Bell, William John Wallace, John Johnstone Anderson Weir, James Garbutt, Ferguson James Dunbar.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- 1884 and 1885.
- Arithmetic.
  - Euclid, Bb. I., II., and III.
  - English Grammar and Composition.
  - English History—Queen Anne to George III.
  - Modern Geography—North America and Europe.
  - Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic ; Algebra, to end of Quadratic Equations : Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem :—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek :

## FRENCH.

A paper on Grammar.

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## OF NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somervilles Physical Geography.

## FIRST INTERMEDIATE.

Williams on Real Property, Leith's Edition ; Smith's Manual of Common Law ; Smith's Manual of Equity ; Anson on Contracts ; the Act respecting the Court of Chancery ; the Canadian Statutes relating to Bills of Exchange and Promissory Notes ; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition ; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills ; Snell's Equity ; Broom's Common Law ; Williams on Personal Property ; O'Sullivan's Manual of Gov-

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

## FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

## FOR CALL.

Blackstone, vol. 1, containing the introductions and rights of Persons; Pollock on Contracts, Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

## CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5 The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks,

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Thursday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchor, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## FEES.

Notice Fee .....	\$ 1 00
Student's Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above .....	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

# Canada Law Journal.

VOL. XX.

MARCH 1, 1884.

No. 5.

## DIARY FOR MARCH.

- 1 Sat. .... St. David's Day.
- 2 Sun. .... 1st Sunday in Lent.
- 3 Tues. .... County Court (York) Sittings. Osler, J., appointed, 1879. Court of Appeal Sittings.
- 6 Thur. .... Name of York changed to Toronto, 1834.
- 9 Sun. .... 2nd Sunday in Lent.

TORONTO, MAR. 1, 1884.

WE publish in another place an article contributed to the *Albany Law Journal* by an old and valued friend of our own, R. Vashon Rogers, jr., on a subject of general interest. It is pleasant to know that the production of an inhabitant of this "hyperborean" region—a country which seemed to cause a cold shudder to our contemporaries during the recent visit of Lord Coleridge—is allowed a place in its well-filled pages. We trust that our namesake will at least give us credit for unselfishness in not keeping the best things of their kind north of the equator to ourselves.

IN *Wansley v. Smallwood* the Divisional Court of the Chancery Division recently determined that the hearing of a cause on further directions is not to be regarded as a trial of the action; and that no appeal lies from a judgment so pronounced to the Divisional Court, under rule 510. According to this decision the only forum to which an appeal from such judgments can be made is the Court of Appeal. Appeals from judgments pronounced on further directions, therefore, stand on the same footing as appeals from orders made by a judge in Court on appeals from a master's report, or upon a demurrer, and are governed by the rule laid down in *Re*

*Galerno*, 46 U. C. R. 379; *Trude v. Phoenix*, 29 Gr. 426; *McTiernan v. Fraser*, 9 P. R. 247.

THE announcement made by Rose, J., on February 20th, in reference to the application in *Lyon v. Wilson* for judgment under Rule 324, perhaps may be regarded as a settlement of the questions which have arisen as to the propriety of the order made by Osler, J., in *Kinloch v. Morton*, 9 P. R. 38, with reference to an applicant for speedy judgment under Rule 324, being allowed his judgment only on terms of sharing in respect to his execution *pari passu* with any other execution creditors placing writs in the sheriff's hands before the time at which the applicant would be entitled to issue executions, as in a judgment in default of appearance. This precedent has been followed in several subsequent applications for judgment under this rule, though some of the judges have refused to follow it. Notably in the case of *Bank of Commerce v. Willing & Co.*, it was recently followed by Wilson, C.J. The plaintiffs there subsequently sought to appeal from the order, so far as the above condition or proviso was concerned, to the Divisional Court, and urged that it was most inequitable that whereas the other execution creditors were not bound by the order and could execute for the full amount of their claims, they would have to content themselves with a ratable share of the assets in the sheriff's hands. The appeal was dismissed on the ground of want of jurisdiction to hear it. In connection with *Lyon v. Wilson*, however, Rose, J., has now announced that the judges, or some of them, had agreed henceforth to make

## THE FEDERAL CONSTITUTION—APPELLATE DIFFICULTIES.

orders under Rule 324 without any such condition, but would scrutinize very closely the material furnished upon such motions, and would not grant judgments, except in extreme cases.

Just before going to press, the first of the letters on the interpretation of the Federal Constitution, known as the British North America Act, by the Honourable Mr. Justice T. J. J. Loranger, reaches us, and we look forward to a careful perusal of this and any other subsequent letters on the same subject, by the learned author. The motto on the title page, "*Si vis pacem, para bellum*," and the passage in the preface: "It is, in truth, the cause of the Provinces that I have undertaken to defend against an enemy which as yet appears only a spot upon the horizon, but this spot may increase in size, may become a cloud, and the cloud may bring forth a tempest! From out of this tempest may we never see arise . . . Legislative Union," indicates to us what the writer fears, and what he aims at averting. Mr. Loranger writes primarily from a Lower Canadian point of view, and will find many doubtless in other Provinces to concur in his hopes and fears. There are others however who think that a "complete non-conductor of national feeling between the Maritime Provinces and Ontario" is not, in the interests of the whole Dominion, a thing to be preserved at all hazards, and that if some scheme could be found which would without injustice cause a gradual assimilation of discordant elements, a great step in advance would have been taken; but, as we look upon the maintenance of a sound understanding of the proper constitutional relation between the several Provinces and the central power as a matter of vital importance to the future of our country, we shall study Mr. Loranger's dissertations with much interest, and hope hereafter to discuss them at greater length.

## APPELLATE DIFFICULTIES.

THE case of *Williams v. Corby* (7 S.C.R. 470), which was decided by the Supreme Court as long ago as 1881, but which has been only recently reported, is another of those cases which present a curious conflict of judicial opinion, the net result of the litigation being that five judges pronounced in favour of the plaintiffs, and five in favour of the defendants. Under these circumstances therefore it is perhaps to be considered satisfactory that the ultimate decision was in favour of the defendants, if the conflict of opinion is a true criterion of the doubtful character of the plaintiffs' claim. The case arose out of the purchase by plaintiffs of a cargo of corn on behalf of the defendants as their agents as the plaintiffs contended. The corn was purchased by the plaintiffs and shipped to the defendants as being "at the defendants' risk," and so invoiced by the plaintiffs to the defendants. The plaintiffs however, instead of taking the bill of lading in the defendants' name took it in favour of the person whose name should be written by the plaintiffs on the margin. The plaintiffs drew on the defendants for the price of the corn, and then indorsed the draft (together with the bill of lading, as collateral security) to the Merchants' Bank, with instructions not to hand over the bill of lading, nor allow the cargo to be delivered until the draft was paid. The draft was accepted by the defendants, but on the arrival of the ship the cargo was found to have been damaged on the voyage, and the defendants then refused to pay the draft or accept the cargo. The plaintiffs then sold the cargo, and the action was brought to recover the difference between the amount realized by the sale and the contract price. The case was originally tried before Blake, V.C., who dismissed the plaintiffs' bill, but on appeal to the Court of Appeal his decision was unanim-

## APPELLATE DIFFICULTIES—RECENT ENGLISH DECISIONS.

ously reversed, while on appeal to the Supreme Court the decision of the Court of Appeal was reversed, Strong, J., however, dissenting. The following Judges were in favour of the plaintiffs: Moss, C. J. A., Burton, Patterson & Morrison, JJ. A., and Strong, J.; those in favour of the defendants being Blake, V.C., Ritchie, C. J., and Fournier, Henry & Gwynne, JJ. The case seems to have turned altogether on the question whether the plaintiffs were to be regarded as acting as principals or agents. The Court of Appeal held them to be merely agents, whereas the Supreme Court agreed with the judge of first instance that they must be regarded as having acted as principals, and that the taking of the bill of lading in the way in which it was taken indicated a clear intention on the part of the plaintiffs not to part with the property in the goods until payment; and, consequently, that in the meantime the goods were (notwithstanding the way they were invoiced by the plaintiffs) really "at the risk" of the plaintiffs—the consignors.

In *Crysler v. McKay* the opinion of nine judges was overruled by three judges of the Supreme Court. In the Mercer case four judges of the Supreme Court overruled the opinions of seven judges, and the latter were ultimately held by the Privy Council to have correctly decided the case. Although the mere counting of heads is by no means an infallible test of the probable accuracy of a decision, yet perhaps after all it is a more satisfactory mode of arriving at a decision than leaving the matter to a chance majority in the ultimate Court of Appeal, and we are by no means clear that it would not be a wise provision to make, that the decision of the Supreme Court shall not have the effect of reversing any judgment, unless the total number of judges concurring in the reversal, that is to say in all the Courts, shall exceed in number those who have pro-

nounced in favour of the respondent. If every judge of the Supreme Court was of such transcendent ability that his opinion was infallibly of greater value than those of the judges of first instance, and of the intermediate appellate Court, this might be unwise, but it is paying no disrespect to their Lordships of the Supreme Court to say that men are to be found both in the Courts of first instance and in the intermediate appellate tribunals of this Province, who are the peers in every respect of any members of the Supreme Court bench, and it cannot but be unsatisfactory to any suitor to find that, although he has succeeded in obtaining a large majority of judges in his favour, he has, nevertheless, been worsted in the litigation.

## RECENT ENGLISH DECISIONS.

THE bulky December number of the Chancery Division Law Reports, comprising 24 Ch. D., p. 253 to p. 744, contains several important decisions which it is now proposed to notice.

## SOLICITOR AND CLIENT—ENJOINING SALE BY MORTGAGEE.

At p. 289 is a case of *Macleod v. Jones*, in which, while the general rule in respect of granting injunctions to restrain mortgagees exercising their power of sale is affirmed to be, in the language of Brett, M.R., that a mortgagee "could not be stopped from selling the estate without the mortgagor paying into court, or otherwise securing to him, not what the court might think *prima facie* was due to him as far as they could ascertain, but without paying into court that which he demanded, subject to a subsequent enquiry," yet it is held there is a difference, where, as in this case, the mortgagee is a solicitor endeavouring to enforce securities against his client. Here the plaintiff had allowed her solicitor to buy up a number of mortgages on her property, and take a transfer to himself, and was

## RECENT ENGLISH DECISIONS.

bringing this action to impeach the securities, and to restrain a threatened sale of the property, and now moved for an injunction until the hearing. Brett, M.R., remarks, at p. 295, on the dangerous position in which the solicitor had put himself: "He, the person whose duty it is to settle her (the plaintiff's) affairs—to settle them in the best way for her—puts himself in the position of being one of her creditors; the solicitor who is to advise her makes himself her creditor, and I think that is a very dangerous position. . . . That gives the court a jurisdiction over him beyond the jurisdiction that it has over a mere mortgagee. It is the jurisdiction which the Court exercises as between solicitor and client, and I take it the real meaning of it is this: That where matters, are called in question as between solicitor and client, inasmuch as the client has thereby lost the advice of the solicitor, the Court steps in and looks for itself, and as far as it can, to a certain extent, acts for the client in a way the solicitor would have done if he had been only solicitor, and expected to give her the advice for which he is paid as solicitor. Therefore, when a solicitor is nominally the mortgagee, and when he assumes to exercise his right to sell as mortgagee, it seems to me the Court has jurisdiction to inquire immediately into the circumstances of the case, and will not allow the solicitor to exercise his unqualified rights as mortgagee, but will only allow him to exercise those rights subject to the control of the Court, and to his doing so in an equitable and fair manner as between a solicitor and his client. Therefore in the present case the Court granted the injunction on the plaintiff paying into Court such a sum as the Court considered would cover the amount actually advanced by the defendant, and amending the writ so as to make it a simple action for redemption and injunction.

## WARD OF COURT—PARENTAL AUTHORITY.

The next case to be noticed is *In re Agar Ellis, Agar Ellis v. Lascelles*, at p. 317. The celebrated case, reported in L. R.<sup>10</sup> Ch. D. 49, in which the right of Mr. Agar Ellis to do what he thought best for the spiritual and temporal welfare of his children, despite the promise given by him to his wife before marriage, that the children of the marriage should be brought up as Roman Catholics, was affirmed, will be remembered. When the eldest daughter reached the age of sixteen Mr. Agar Ellis removed his opposition to her practising the Roman Catholic religion, but he insisted upon putting restrictions on her intercourse with her mother on the plea that he believed the mother would alienate her affections from him. The daughter was at this time a ward of Court, but notwithstanding this fact, and that the daughter was over the age of sixteen, the Court refused to interfere. The case is a striking enunciation of the law as to paternal control. The distinction is pointed out between cases where a child is away from the father, and the father endeavours by *habeas corpus* to recover possession of the child, and cases where, as here, the child is under the control of the father and it is sought to interfere with his power of control. The law is thus stated by Brett, M.R., at p. 326-7:—"The law of England is that the father has the control over the person, education and conduct of his children until they are twenty-one years of age. That is the law. If a child is taken away from the father, or if a child leaves the father and is under the control of, or with, other people, then the application for a *habeas corpus* is no part of the law of equity as distinguished from the Common Law of England. It is the universal law of England that if any person alleges that another is under illegal control by anybody, that person, whoever it may be, may apply for a *habeas corpus*,

## RECENT ENGLISH DECISIONS.

and thereupon the person under whose supposed control, or in whose custody the person is alleged to be illegally and without his consent, is brought before the Court. But the question before the Court upon *habeas corpus* is whether the person is in illegal custody without that person's consent. Now up to a certain age children cannot consent or withhold consent. They can object or they can submit but they cannot consent . . . But above the age of fourteen in the case of a boy, and above the age of sixteen in the case of a girl, the Court will inquire whether the child consents to be where it is; and if the Court finds that an infant, no longer a child, but capable of consenting or not consenting, is consenting to the place where it is, then the very ground of an application for *habeas corpus* falls away. I say, if it is the father who applies for the *habeas corpus* the *habeas corpus* is not granted. . . . The law was administered in the same way by a Chancery Judge as by a Common Law Judge. . . . The cases of *habeas corpus*, therefore, do not at all apply to the proposition for which they were cited. In the present case they are, of course, inapplicable, because the child is not away from her father—the child is under the control of her father; and this application is not for a *habeas corpus* by the father to restore the child, but the application is for an order of the Court to be made against the father. These cases, therefore, seem to have no application." He then goes on to lay it down that the Court will not interfere with the father in the exercise of his parental authority, except where, by his gross moral turpitude he forfeits his rights, or where he has by his conduct abdicated his parental authority, or where he seeks to remove his children, being wards of Court, out of the jurisdiction without the consent of the Court. At p. 334, Cotton, L.J., says:—"It has been said that we ought to con-

sider the interest of the ward. Undoubtedly. But this Court holds this principle—that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child." And this passage may well be supplemented by the concluding passages in the judgment of Bowen, L.J., at p. 338:—"As soon as it becomes obvious that the rights of the father are being abused to the detriment of the interests of the infant, then the father shows he is no longer the natural guardian—that he has become the unnatural guardian—that he has perverted the ties of nature for the purpose of injustice and cruelty. When that case arrives the Court will not stay its hand; but until that case arrives it is not mere disagreement with the view taken by the father of his rights and the interests of his infant, that can justify the Court in interfering."

## HUSBAND AND WIFE—INJUNCTION.

In the next case calling for special notice, *Symonds v. Hallett*, p. 346, a married woman sought to enjoin her husband from entering the house in which they had for some years after their marriage dwelt together, and which by her marriage settlement had been settled on her to her separate use, free from his control. The plaintiff had instituted proceedings for divorce, or judicial separation against the defendant, who had ceased to cohabit with her, but insisted on the right to go to and use the house when and as he thought fit, not for the purpose of consorting with his wife, but for his own purposes. As said by Bowen, L.J., he "complained of not being allowed the proprietary use of the house." The plaintiff succeeded in ob-

## RECENT ENGLISH DECISIONS.

taining an interim injunction from the judge of first instance, and the Court of Appeal now refused to discharge it, though cautiously avoiding a positive opinion on the question of law involved. It was argued in opposition, that separate use was intended by Courts of Equity, to preserve property for the benefit of the wife, but it was never intended to operate so as to interfere with the domestic relations between husband and wife; that any contract, therefore, that either directly or indirectly involves a future separation between husband and wife is void as being against public policy; and that this injunction would cause the marriage settlement in this case to have that effect, and should therefore not have been granted. Cotton, L.J., goes the nearest to expressing an opinion on the law of the case. At p. 351, he says: "Undoubtedly Courts of Equity have said that when property is settled to the separate use of a married woman, she is as regards that property to be considered as if she were a *feme sole*; that is so, as regards protecting the property against the interference by the husband; if he wishes to deal with it as his property, and to deprive his wife of the property in it, then undoubtedly Courts of Equity will interfere, and it is their duty so to do. But where it is not interference with the property, assuming it is the property of the wife and that the husband has no right to interfere with it *quod* property, it is a very different thing to say that she, a married woman, can insist on a Court of Equity preventing her husband entering the house . . . My view is this, that the separate use was not created by a Court of Equity in any way to enable a wife to prevent the husband from exercising his rights and duties as an husband, except by preserving property for her. I concur in the view that this injunction ought not to be discharged, on this ground, that, looking at the circumstances of the case

and at the facts which we have before us, and the affidavit of the husband, he cannot be considered as desiring to use or to enter this house as a husband, to enjoy the society of his wife, or to consort with her as his wife."

A. H. F. L.

## SELECTIONS.

## UPSTAIRS AND DOWNSTAIRS TENANTS.

"Birds in their little nests agree." So saith the poet. But men living in the same house do not always so. Some of the grievances suffered from the fellow-lodgers and landlords, and the remedies and attempted remedies therefor, are herein treated of.

Sometimes tenants object to noises made by other occupants of the same house, and oftentimes they have to object in vain, and can obtain no redress either against the landlord or their co-tenants. Where the rooms beneath the complainant's were used by another tenant for purposes of a highly immoral nature, and the frequenters thereof by singing immodest songs attracted a noisy crowd of boys in the street, the court held that this did not amount to an eviction of the complainant, and that he could not insist upon a diminution of the rent because the landlord did not put out the naughty tenant below according to promise. *De Witt v. Pierson*, 112 Mass. 8.

Where one tenant has obtained from the landlord the privilege of erecting a sign in front of the house, other tenants in the same building cannot interfere with number one's privileges. And as according to Mr. Justice Fry, of the Chancery Division of the English High Court of Justice, it is in the nature of sign-boards to creak, the court will not interfere when the creaking is not in excess of what is naturally incidental to a sign-board. *Snyder v. Hersberg*, 11 Phila (Pa.) 200; *Moody v. Streggles*, L.R., 12 Ch. Div. 261. It might have been useful if the learned judge had intimated how often a sign-board might, should or would creak in a day, and in how many notes; the key doubtless would be both high and flat.

About the year 1870 poor Higinson had an infant child—some fifteen months old—which was teething, and consequently sick and fretful. H. also

## UPSTAIRS AND DOWNSTAIRS TENANTS.

had a parlour baby carriage in which, to quiet his darling, he was in the habit of trundling his child up and down his carpeted rooms at divers times by day and by night. An unfortunate Mr. Pool had rooms below those in which the baby ruled supreme, and he objected to lying quietly and impassively beneath the juggernaut wheels of the youthful Higinson, so applying to the court he asked that the noise might be stopped. Pool failed to show that the noise was made unnecessarily, or that it was made for any purpose other than soothing the child's sufferings; so the injunction to stop the noise was refused. The court said that occupants of buildings, where there are other tenants, cannot restrain the others from any use of their own apartments, consistent with good neighbourship, and with a reasonable regard for the comfort of others. "If the rocking of a cradle, the wheeling of a carriage, the whirling of a sewing machine or the discord of ill-played music, disturb the inmates of an apartment house, no relief by injunction can be obtained, unless the proof be clear that the noise is unreasonable and made without due regard to the rights and comforts of other occupants." To warrant an interference on the part of the law the noise must produce actual physical discomfort to a person of ordinary sensibilities and must have been unreasonably made. 18 Alb. L. J. 82; 8 Daly (N.Y.) 113.

Lord Justice Mellish also thought that the noise of neighbour's children in their nursery, as well as the noise of a neighbour's piano, are such noises as men must reasonably expect, and must to a considerable extent put up with. *Ball v. Ray*, L. R., 8 Ch. 471. Probably both Judge Van Hoeson (who decided against poor Pool), and his lordship were both family men. Suffering humanity however will rejoice that both admitted that there was a limit even to the noise that must be endured from children. *Modus in rebus*, as Lord Kenyon would say.

The law of gravitation, which started Newton thinking by hitting him on the nose with an apple, has frequently proved injurious to tenants occupying lower flats. The question has been frequently discussed whether the landlord, or some person or any person else, is liable for liquids percolating through from upper stories and falling upon, and so injuring the goods, wares or merchandise of sub-servient tenants.

Firstly, let us consider where the landlord can be held responsible because of the rain oozing through or other fluids dropping down. *Carstairs v. Taylor*, L. R., 6 Ex. 223, settles that the landlord is not responsible for the peccadilloes or gnawings of rats (if he does not know of their doings, at all events).

Taylor rented to the plaintiff the ground floor of a warehouse in Liverpool for the purpose of storing rice. Nothing special was said as to repairs. Taylor occupied the upper floor. The water from the roof was collected in gutters which terminated in a wooden box, resting on the wall and partly projecting over it in the inside; thence the water was discharged by a pipe into the drain. The gutters and box were examined from time to time, and on the 28th of April, when looked at, were found secure, but between that date and the 22nd, a rat or rats wilfully and maliciously—if not feloniously, gnawed, nibbled, bit and ate a hole in that part of the box which projected on the inside of the wall. On the 22nd Jupiter Pluvius was active and a heavy storm occurred and the collected rainwater passed through the hole into the upper floor of the warehouse, and thence obeying the dictates of nature descended to the ground floor, injuring the plaintiff's rice. The Court of Exchequer held that Taylor was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it entered the warehouse. Kelly, C. B., remarked: "Clearly there is no duty on the occupier above, whether he be landlord or only occupier, to guard against an accident of this nature. It is absurd to suppose a duty on him to exclude the possibility of the entrance of rats from without." (*Ex pede Hæculem*: verily the learned chief baron, showed the land of his origin in these last quoted words.) His brother Bramwell evidently thought that he knew the general tactics pursued by these rodents in entering warehouses; he remarked: "It is said that rats can be easily got rid of out of a warehouse, but assuming it to be so, it is no negligence not to take means to get rid of them till there is reason to suppose they are there; and it cannot be said that persons ought to anticipate that rats will enter through the roof by gnawing holes in the gutters."

In Maine it has been held that an action will lie at the suit of a tenant of a store in the lower storey of a building against a landlord, who has the care and control of the upper stories, for an injury to his goods caused by the rain descending through the roof down upon the store below, if the accident happens through the negligence of the landlord in the management of that part of the building under his control. *Toole v. Becket*, 67 Me. 544; citing *Priest v. Nichols*, 116 Mass. 401. And in New York it was decided that where a landlord, who himself occupied the upper flat, allowed liquids to leak through into his tenant's rooms, he was liable. *Stapenhurst v. Amer. Man. Co.*, 15 Abb. Pr. (N. S.) 355.

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In Georgia the courts considered that the landlord was responsible to the tenant down below for damages arising from the overflow of a bath tub, *et cetera*, in an upper flat, even though the water-works were properly constructed and another tenant who had access to and had a right to use these modern conveniences was the one whose carelessness caused the injury. But the Court said that the decision would have been otherwise had the proprietor shown that the exclusive possession and user of the bath room had been in a negligent tenant. *Freidenburg v. Jones*, 63 Ga. 612; 66 id. 505.

But in Illinois it was decided that a landlord who had not expressly covenanted with his tenant to repair was not liable to pay the damages caused by water, either dirty or clean, coming upon the tenant from above through the carelessness of another tenant or otherwise. *Green v. Hague*, 10 Ill. App. 598; *Mendel v. Fink*, 8 id. 378. Nor must he pay if the water-pipe suffers a temporary obstruction, if he sends for the plumber as soon as he knows that his labours are required. The law is merciful and requires no man to keep a plumber always on his premises. *Green v. Hague, supra*. And so in New York: there one A. hired the basement and first floor (according to Cis-Atlantic notions) of a building for a bake shop. The owner entered into an agreement with some builders to make alterations in the upper stories; the work was negligently done and A.'s bake shop was injured by the dust and rain. The owner however was not to blame, and the careless acts of the contractors had been contrary to his wish and advice. The court, when asked to consider the case, gave it as their opinion that the landlord was not liable. *Morton v. Thurber*, 85 N. Y. 550.

Now as to the liability of other persons in this direction. It seems clear that if a housemaid, whose duty it is to keep in order an upper room and attend to the lavatory attached to it and wipe out the basin, uses the basin for her own purposes and omits to turn off the water so that it floods the room of another occupant below, then the master of the said domestic will be liable to the gentleman downstairs; and that although the master had expressly forbidden his maid using the basin, and had told her never to leave the tap open. This liability attaches to the master because the servant's acts would be incidental to her employment. *Per Grove, J., Stevens v. Woodward*, 6 Q. B. D. 318.

If, however, a law student should go into his master's private lavatory and leave the water-tap running, the solicitor would not be liable for the results. This was decided in the case lastly mentioned, which is a very interesting case and one

that should be carefully studied by all law clerks. The plaintiff's were booksellers occupying the basement of a house, and the defendants, a firm of solicitors, who occupied the floor above. Water overflowing from the lavatory in the private room of one of the defendant's escaped through the floor to the basement, injuring the bookseller's stock-in-trade. The flooding was caused by a clerk of the solicitors, who, after Woodward had left for the day, had gone into the private room to use the water and left the tap open. The clerk had no right to use the basin, and no business to go into the room after W. had left, and orders to that effect had been given. The jury gave a verdict for £15. When the matter came before the court the learned counsel for the plaintiff expressed his views of the daily routine and general practice of law students; and on the other side what was the duty of such necessary members of society was proclaimed. Candy was for the booksellers; he said: "Here the clerk was in the office during working hours, and it was part of the routine of the day's work to wash his hands. It is the general practice of such clerks to wash their hands in the offices where they are employed. That he was forbidden to do so (go into the private room) is irrelevant. He was acting within the scope of his employment." *Venables v. Smith*, 2 Q. B. D. 279. On the other hand, Petheram, Q. C., Dewitt and G. G. Kennedy, remarked in support of the rule for a non-suit, that the principle is well stated in *Whatman v. Pearson*, L. R., 3 C. P. 422. Here the clerk was acting for himself, and on his own responsibility. His duty was clearly to keep in his own room and not to wash his hands in the room of his master. Could it have been said that the master would have been liable if the clerk had washed his hands in some tavern near by during office hours, and left the tap there running? The court disposed of the matter by holding that the solicitors were not liable, for that the act of the clerk was not incidental to his employment, and that he was not acting within the scope of his employment. Grove, J., thought he would have come to the same conclusion as that he had arrived at, if there had been no express prohibition in the case, and it had merely been shown that the clerks had a room of their own and a lavatory where they could wash their hands, "then what possible part of the clerk's employment (he continued) could it be for him to go into his master's room to use his master's lavatory, and not only the water, but probably his soap and towels solely for his, the clerk's own purpose? What is there in this in any way incidental to his employment as a clerk? I see nothing." His lordship said it was a very nice question.

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We wonder what would have been the decision if the clerk had had no basin of his own and been about to go into the Chancery Division of the High Court of Justice on office business, and his fingers were soiled with rummaging among dead suits. Would it not then have been within the scope of his employment and duty to wash his hands in his master's basin, using his master's soap and towels, for verily equity requireth a man to come into court with clean hands.

One Ross (and his partners) occupied a ground floor of a building for business premises, and Fedden the second floor of the same house, each as tenants from year to year. On Fedden's flat there was that necessity of modern civilization invented by Sir John Harrington, and referred to by him in his celebrated tract called "The Metamorphoses of Ajax," and he and his had the exclusive use of it and none others had access thereto. After all parties had closed up on a Saturday evening, water percolated from this private room through the first floor to Ross' premises, causing damage to his stock-in-trade. The overflow of the water was owing to the valve of the supply pipe to the pan having got out of order and failed to close, and the waste pipe being choked with paper. The defects could not have been detected without examination; Fedden did not know of them and had been guilty of no negligence. The matter came before the judges of the Court of Queen's Bench, and they held that Fedden was not liable for the damage as there was no obligation on him to keep the water at his peril. *Ross v. Fedden*, L. R., 7 Q. B. 661.

To pass from water to fire. Suppose an upstairs tenant when he enters into possession finds a stove-pipe hole in his floor, and a pipe passing up through it into the chimney in his room, and that it is the way provided by the landlord to enable the tenant below to get rid of the smoke from his fire, and it is necessary for the proper enjoyment by the man downstairs of his apartments; then the entrant if he makes no special contract does not become the absolute possessor of all the space comprised within the four walls of his holding, but only of that subject to the passage and use of the pipe; he takes his room with easement attached or user appurtenant, and if he severs, cuts and damages the pipe, and renders it unfit for use, so that the smoke from the room below, instead of passing through its proper cylinder into the chimney, escapes from the pipe and fills the room downstairs, the upstairs tenant is a wrong-doer and liable for damages. *Culverwell v. Lockington*, 24 C. P. (Ont.) 611.

We find it well established that a tenant on the second flat is entitled to the use of the stairs and passage-way and to the front door; he is not

obliged to use either the fire escape or a parachute when he wishes to get in or out of his rooms. Nor is the landlord entitled to lock up at six o'clock, or any other unreasonable hour, or in fact any hour, and refuse to allow the tenant to have a key. This was so held in the case of some lawyers who had their offices on a second story; and the reason is that when a party rents to another premises, he impliedly grants all that is indispensable for their free use and full enjoyment. If the landlord thinks it necessary for any particular reason that the street door should be closed and locked at and between particular hours, he should be careful to insert such a stipulation in his lease or agreement. *MacLennan v. Royal Insurance Co.*, 39 U. C. R. 515.

Not only has a tenant of rooms on an upper floor of a house a right of ingress, egress and regress by the front door, but (unless otherwise agreed) he is entitled to use the knocker and to ring the bell attached to the door; and his visitors also have a right to notify people of their desire for admission in either way they choose, and may do so without any fear of an action of trespass being brought against them, no matter how humble their station, and although (as Lord Abinger remarked) at some houses servants ring the bell and persons of superior rank knock. And not only has such a tenant the right to use the stairs but also the bannisters thereof, and further, he is entitled to the benefit of the skylight to enable him to see his way up and down stairs. Lord Abinger decided this in 1835. A plaintiff declared to the effect that he was possessed of four rooms in a dwelling-house on Leicester street, Leicester square (i.e., as the evidence showed, he had rented two rooms on the first floor and two on the second floor of the defendant's house), by reason whereof he ought to have for himself, his family, friends and acquaintances, free access into and out of the said rooms, up and down the stairs and staircase leading to the said rooms, and the benefit of a skylight which before then had lighted the said stairs and staircase, and of a W. C. situated on the first floor of the said dwelling-house, and of the knocker affixed to the street door of the said dwelling-house, and of a bell at the side of the said dwelling-house; yet that the defendant wrongfully bedaubed the bannisters of the staircase with filthy and adhesive matter (only tar, as the evidence showed), blocked up the skylight, removed the W. C., took the knocker from the street door and cut the wire from the bell, whereby the plaintiff suffered immensely. The learned chief baron was against the naughty defendant on all these points, and under his direction the jury awarded the plaintiff £50 damages. *Underwood v. Burrows*, 7 C. & P. 26.

## UPSTAIRS AND DOWNSTAIRS TENANTS—CORPORATION OF BROCKTON V. DENISON. [Mun. Case.]

The judge was of the opinion that if all these outrageous things had been done to drive the plaintiff away, the defendant might (in order to mitigate damages) have shown that the plaintiff and his family were bad lodgers and that he did these acts to get rid of them.

In a tenement house the landlord must keep the stairs in order. In a Scotch case a child fell through the railing on the staircase, where a bannister was wanting and was killed; the house was occupied by twelve different families, all of whom had access by this one common stair to the various landings on which were their respective apartments. The Court of Session held that it was the landlord's duty to keep the bannisters in repair, and that he could not escape responsibility for the consequences of their being left in a dangerous condition. The owner had to pay damages to the child's father; here however the factor in charge of the property had been warned of the state of the railing. *McMartin v. Hannay*, 10 Ct. of Sess. Cas. (3d ser.) 411.

Hedges was the landlord of a house in Red Lion street, Wapping, which he let out to several tenants, to each of whom he said (in effect if not in words): I let you certain rooms, and if you like to dry your linen on the roof you may do so; the roof was flat and covered with lead, having a wooden railing on the outer edge, and one got to it through a low door at the stair-head, about two feet from the rail. Ivay, one of the tenants, went on the roof to remove some linen, he slipped against the railing, and it being out of repair (to the landlord's knowledge) gave way and let him down to the courtyard below, whereby he was injured. Lord Coleridge agreed with the County Court Judge, and was unable to see any liability on the part of the defendant—the landlord; he said that under the contract the tenant took the place as he found it, if he chose to use the roof he did so *cum onere*. If there had been an absolute contract for the use of the roof in a particular way, it might have been that Hedges would have been liable for not keeping it in a safe condition. *Ivay v. Hedges*, L. R., 9 Q. B. Div. 80.

The plaintiff's counsel did not quote the law of Moses on this point, Deu. 22, 8, but then on many points the law of Moses does not now hold good in England.—*Albany Law Journal*.

Applications to the Chancery Division for the opinion of the Court under *The Vendors' and Purchasers' Act*, are hereafter to be made on petition, which is to be set down for hearing in Court on a Wednesday; the Judges of that Division having announced that they will not hereafter hear such applications in Chambers.

## REPORTS.

## ONTARIO.

## MUNICIPAL CASES.

## TENTH DIVISION COURT—COUNTY OF YORK.

## CORPORATION OF BROCKTON V. DENISON.

*Arbitrator's fees—No action lies where no award.*

Where a corporation brought an action for arrears of taxes, and defendant claimed a set-off of arbitrator's fees for acting as third arbitrator in an arbitration, under a by-law passed by plaintiffs, *Held*, that as no award had been made no action would lie, either at Common Law or under our statute (R. S. O. cap. 64, sec. 12), to recover arbitrator's fees.

[Toronto, Feb. 1, 1884.]

The facts of the case sufficiently appear in the judgment of

McDOUGALL, J. J.: This is an action brought by the corporation of the village of Brockton against the defendant to recover the amount of certain arrears of taxes due by him to the municipality. The amount claimed is \$96, but, upon the evidence, the plaintiffs admit that this sum should be reduced to \$68; and the defendant does not seriously contest their right to recover the latter sum. The defendant, however says that he has a set-off, or counter claim, against the municipality for \$54, being certain charges for arbitrator's fees, and contends that the plaintiffs' claim of \$68 should be further reduced by deducting this amount from their claim. The defendants' alleged claim arises in this way. It appears that the municipality proposed opening a new street within their limits, and to that end passed a by-law, No. 39, on the 26th June, 1882. The by-law provided that the width of the proposed new street should be *sixty* feet instead of *sixty-six* feet, as required by section 545 of the Consolidated Municipal Act of 1883. This by-law the council of Brockton passed without first obtaining the permission of the County Council, as required by the Act whenever a local municipality desires to open a street of less width than *sixty-six* feet. The by-law was consequently bad. Acting, however, upon the assumption that the by-law was valid, the plaintiffs passed a second by-law, No. 42, on the 28th August, 1882, appointing an arbitrator on behalf of the municipality; and the principal property owner on the line of the proposed street, a Mr. Mallon, also appointed an arbitrator. These appointments were made under the provisions of

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CORPORATION OF BROCKTON V. DENISON—NOTES OF CANADIAN CASES.

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the Municipal Act, for the purpose of fixing the amount of compensation to be paid Mr. Mallon for the land required for the proposed new street. The arbitrators so appointed met and duly appointed the defendant herein as the third arbitrator, pursuant to sec. 390 of Municipal Act. The three arbitrators met a number of times, but early in their proceedings doubts appear to have been cast upon the legality of the by-laws, under which they were acting, and they never actually took any evidence or made any award in the matter referred to them. It appears that counsel was consulted, and the arbitrators were told that they had no power to do anything under the by-law or under the submission made to them. The council of Brockton, it is sworn, (though not established by strictly legal evidence,) subsequently repealed by-law No. 39, which was the by-law opening the street, and steps are now being taken, it is alleged, to pass a valid by-law by petitioning the County Council for leave to open a sixty foot street as contemplated by the invalid by-law. It is also proved that the plaintiffs have paid their own arbitrator his fees for his lost time and attendance in connection with the abortive reference. The defendant contends that the plaintiffs are liable to him also for his arbitration fees for like services in the same matter, as third arbitrator duly appointed, the failure of the proceedings being caused by their not complying with the plain statutory directions.

At Common Law an arbitrator had no right of action for his fees. His remuneration, it is said, like that of a physician or barrister, is to be left to the option of his employers, and could not be enforced by action (Russell on Awards, 2nd ed. 450). Where, however, there is an express promise to pay he may maintain an action, for the taking upon himself the burthen of the reference is quite a sufficient consideration (*Hoggins v. Good* 3 Q. B. 466). The only protection that an arbitrator would appear to have for his costs was his lien upon the award, and this was the only security upon which he could rely for the satisfaction of his claim; and it is well known that the practice is not to deliver up an award until payment of the arbitration charges.

Under our statute, however, in reference to the costs of arbitration (R. S. O. cap. 64), an arbitrator is given a right of action for his fees, but this is only under certain conditions, and upon his observing certain formalities. Section 12 of that Act is as follows: "In all cases where an award has heretofore been or is hereafter made the arbitrator making the same may maintain an action for his fees upon such award, after the same have been

taxed, which taxation may be made at the instance of the arbitrator, upon notice to any party to the reference against whom he may afterwards bring such action; and in the absence of an express agreement in respect thereof the arbitrator may maintain such action after such taxation against all the parties to such reference jointly and severally."

Now, in this case, there are three or four insuperable difficulties in the way of the defendant succeeding upon his contention:

1st. The by-law under which he was to act was invalid, and all proceedings thereunder were therefore clearly irregular.

2nd. An award was never, in fact, made.

3rd. No express promise to pay these fees was alleged or proved; hence no action lies at Common Law.

4th. Even if there had been an award there has been no taxation of his fees, which is a condition precedent to his right to recover under our statute.

I must, in view of these facts, and for the foregoing reasons, disallow the defendant's set-off, and direct judgment to be entered in favour of the plaintiffs for the sum of \$68 and costs.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

### SUPREME COURT.

Quebec.]

#### ELECTION PETITION.

MAGNAN. ET AL. V. DUGAS.

*Election Petition — Bribery — Corrupt intent —  
Appeal on matters of fact.*

Among other charges of bribery and treating which were decided on this appeal was the following:—

One Mireau, a blacksmith, who was a neighbour of the respondents, had, in his possession for two years several pieces of broken saws, which the respondent had left with him for the purpose of making scrapers out of them on shares. A few days prior to nomination the respondent went into Mireau's shop with a scraper he wanted to be sharpened, and told

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him to keep the old pieces of saw he still might have. The scrapers were worth, in all, about two dollars (\$2), and were of no use to the respondent. No other conversation took place afterwards between the parties. The Judge who tried the case found that there was no intention on the part of the respondent to corrupt Mireau.

*Held*, that the Supreme Court on Appeal will not reverse upon mere matters of fact the judgment of the judge who tried the case, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that his judgment is not only wrong, but erroneous; that the evidence in this case in support of the charge of bribing Mireau as well as of the other charges of bribery and treating was not such as would justify an Appellate Court in drawing the inference that the respondent intended to corrupt the voters.

*Pagnuelo and St. Jean*, for appellants.

*Pelletier and Marlet*, for respondent.

Nova Scotia.]

WOOD v. ESSON.

*Obstruction in navigable waters below low water mark—Nuisance—Trespass—Pleadings.*

In an action in tort brought by E. et al. against W. for having pulled up piles in the harbour of Halifax below low water mark, driven in by them as supports to an extension of their wharf. W. pleaded *inter alia* that "he was possessed of a wharf and premises in said harbour, in virtue of which he and his predecessors in title had enjoyed for twenty years and upwards before the action, and had the right of having free and uninterrupted access from and to Halifax harbour, to and from the south side of said wharf with steamers etc.; and because certain piles and timbers placed by plaintiff's in said waters interfered with his rights, he (defendant) removed the same." At the trial there was evidence that the erections which E. et al. were erecting for the extension of their wharf did obstruct access by steamers and other vessels to W.'s wharf.

*Held*, on appeal (reversing the judgment of the Supreme Court of Nova Scotia) that, as the Crown could not, without legislative sanction,

grant to E. et al. the right to place in said harbour below low water mark any obstruction or impediment so as to prevent the free and full enjoyment of the right of navigation, and that W. had shewn special injury, he was justified in removing the piles, which were the trespasses complained of.

*W. Graham*, Q.C., for respondent.

*R. Sedgewick*, Q.C., for appellant.

Nova Scotia.]

ATTORNEY-GENERAL v. FLINT.

30 *Vict. ch. 8, sec. 156—Intra vires—Vice-Admiralty Court—Jurisdiction of.*

By the 156 section of the Inland Revenue Act, 31 *Vict. ch. 8*, the Dominion Parliament conferred jurisdiction to entertain suits and prosecutions for the recovery of penalties and forfeitures imposed by the section on the Superior Courts of law of the provinces and the Court of Vice-Admiralty.

*Held*, that sec. 156, 31 *Vict. ch. 8*, is *intra vires* of the Dominion Parliament; that although the Vice-Admiralty Court of the Province of Nova Scotia is not a Provincial or Dominion Court, the jurisdiction conferred upon it by the section 156, may be lawfully assumed by the Vice-Admiralty Court.

*Valin v. Langlois*, 3 S. C. R. 1. followed.

*R. Sedgewick*, Q.C. and *Burbridge*, for appellant.

No one appeared for respondent.

CHANCERY DIVISION.

Proudfoot, J.]

[Jan. 9.]

MACDONALD v. MACLENNAN.

*Will—Construction—Trust for maintenance and education—Duration thereof—"Steadiness."*

A testator by his will, dated May 31st, 1872, after several specific bequests, gave the residue of his real and personal estate to his trustees upon trust to pay to each of his daughters, Josephine and Louise, for life, the annual allowance of \$800 each, which they were then

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receiving; and to pay for the education, maintenance, and ordinary requirements of his son George, and then proceeded: "And I direct my trustees in their discretion, if they find my son George deserving of the same, to make such annual allowance to him as to them may seem warranted by the proceeds of the income of my estate, and if my said trustees are satisfied as to his steadiness they are to treat my said son George in respect to the said allowance in the same manner as my said daughters, Josephine and Louise. . . . It is my will that in the case of each of my said daughters the capital sum necessary to produce the allowance made to her be paid after her death to such person or persons as she may by will direct."

*Held*, that George was only entitled to his maintenance and education during minority, for there was nothing in the will to indicate an intention to extend the trust for maintenance and education beyond that period.

*Held*, also, that George was not entitled to any annual allowance in addition to his maintenance and education during his minority, though the amount which might be paid him after attaining majority, as an annual allowance, was unlimited; resting on what the trustees in their discretion might deem warranted by the estate. For by treating George the same as Josephine and Louise the testator referred only to the mode of payment, and the power of disposing of the principal, not to the amount of the allowance.

It could scarcely be imagined that the testator conceived it probable or possible that the trustees could, upon inspection, satisfy themselves of the steadiness of a boy of twelve years old (George's age at the death of the testator). Time must elapse before such a conviction could be attained, before the character could be formed and a reasonable degree of certainty as to its stability reached, and it is not straining language to infer that this undefined time should cover the whole period of minority.

*J. Bethune, Q.C.*, for the plaintiff.

*N. W. Hoyles*, for the trustees.

*C. Robinson, Q.C.*, and *Lefroy*, for the defendants, other than the trustees.

Ferguson, J.]

[Jan. 28.]

**MCLACHLAN V. USBORNE—MCGEE V. USBORNE.**

*Will—Power to appoint new trustees—Payment to persons no longer trustees—Husbands as trustees—40 Vict. c. 8, s. 30—R. S. O. 107, s. 30.*

A testator, by will dated June 27th, 1871, devised certain properties to H. F. M., J. H. M., and D. M., their heirs and assigns, as tenants in common, and charged the same with \$100,000 (which he designated the trust premises), to be paid by them to C. M. and to his daughters, H. R., and J. M., share and share alike, through their mother, M. M., his wife, as trustee, as therein mentioned; and after sundry provisions, he directed that at the death of his wife, M. M., the said "trust premises" should be held by the said H. F. M., J. H. M., and D. M. and their survivors on the trusts of his will, "unless my said wife shall have previously appointed, by will or otherwise, any other person or persons to be a trustee in her place, which I hereby authorize and give her power to do."

To secure the amount payable to M. M. as trustee, as aforesaid, the plaintiff, who then represented the whole of the devised estate, gave a mortgage, dated Oct. 6th, 1877, and also, at the same time, secured to her a certain mortgage made by one McG.

On Nov. 5th, 1873, M. M., by indenture reciting the will, professed to nominate and appoint L. R. and J. U. to be trustees in her place under the will, and granted them the trust moneys and property.

Afterwards by deed poll of Oct. 6th, 1877, M. M. again appointed L. R. and J. U. to be trustees in her place, and assigned them the mortgage of that date given to her by the plaintiff.

By two payments, one on Oct. 6th, 1877, and one on May 25th, 1881, \$66,666 was paid to M. M. by the plaintiffs, they contending she was trustee under the will, notwithstanding any alleged appointment by her of L. R. and J. U. M. M. paid over to L. R. and J. U. the amount of the first of these payments, but not of the second.

The plaintiffs now claimed that they had discharged the whole of the mortgage money due under their mortgage to M. M. of Oct. 6th,

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[Com. Pleas.]

1877, and claimed a discharge thereof from J. U. and L. R.

*Held*, that the power given by the will to M. M. to appoint a trustee in her place did not authorize her to appoint in her life time, and only authorized her to appoint "by will or otherwise" a trustee to be such after her death, and neither the appointment of Nov. 5th, 1873, nor that of Oct. 6th, 1877, was authorized by the will.

*Held*, also, that R. S. O. c. 107, s. 30 could not be invoked to authorize either appointment, for this enactment did not come into force till Dec. 31st, 1877, subsequently to the transactions in question.

*Held*, however, that under the provisions of 40 Vict. c. 8, s. 30, assented to on March 2nd, 1877, the appointment of Oct. 6th, 1877 was a good and valid appointment.

It is not correct to say that 40 Vict. c. 8, s. 30 has no application in the case of a trustee appointed before the passing of the Act who desires to be discharged from his trust. It has such application.

Moreover, the fact that the new trustees so appointed as aforesaid were the husbands of the *cestui que trustent*, whereas the testator obviously intended that the legacies given to his daughters should be free from the control of any present or future husband, did not make the appointment bad, although it might be that if the court were appointing trustees of the fund, the husbands of the *cestui que trustent* would not be appointed.

The statute is very broad in its language, and a trustee who has from the beginning been a sole trustee has under the Act the same position and power as a last retiring trustee, or a sole surviving trustee.

*Semble*, that 40 Vict. c. 8, s. 30 is prospective and not retrospective in this sense, that it would not make valid the appointment of trustees made prior to its passing without authority.

J. Bethune, Q.C., W. Cassels, Q.C., and Walker, for the plaintiffs.

Gormully, for the defendants.

## COMMON PLEAS DIVISION.

### SUTHERLAND V. PATTERSON.

#### *Guarantee—Promissory Note.*

The defendant wrote to the plaintiff, and, after referring to J. S., the person whom he desired to assist, said: "he informs me how that I could help him by pledging myself to you that you might give him a letter of credit on Montreal; and I now say if you will assist him in that way to \$7,000 or \$8,000, that I will become responsible to you for the like amount in any manner you may wish, as I am fully satisfied that John will protect and take care of any one who would be generous enough to assist him."

*Held*, not a continuing guarantee.

An instrument in the following form was signed by the defendant:—

"Three years after date I promise to pay to the order of J. S., \$5,000 at the office of Mr. A. S., Canifton, value received. This note is given as collateral security for a guarantee of \$5,000 given to J. S. by A. S."

*Held*, not a negotiable promissory note.

Bethune, Q.C., for the plaintiff.

Northrup (of Belleville), for the defendant.

### BROOKE V. McLEAN.

#### *Wall—Erection on plaintiff's land—Damages—Trustee.*

The plaintiff was the surviving trustee under the will of one J. B., of certain land, on which was erected a two-storey brick house, the westerly wall of which formed the boundary of defendant's land. L., who owned the land immediately adjoining plaintiff's land on the west, leased the same to F., who erected thereon a large brick building, using the plaintiff's westerly wall as a party wall; inserting joists therein, and building on the said wall so as to raise it two stories higher, thereby weakening plaintiff's wall. F. mortgaged to a building society, who, in default, sold to the defendant.

*Held*, that the plaintiff under O. J. Act, Rule 95, was entitled to maintain an action as representing the estate without making the *cestui qui trust* parties; and that he was entitled under the circumstances to a decree that the defen-

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.

dant should desist from further using in any way whatever the said wall built on the top of the plaintiffs said wall, or the ends of the joists which he had put in the plaintiff's wall.

*Held* also, that the plaintiff was entitled to recover as damages the expense of removing the said wall so erected on his wall, which were assessed at \$105, and the damages occasioned by his wall being weakened which were assessed at \$10, making in all \$115; but that the plaintiff could not recover damages for the loss of a sale of the property by reason of erection, etc.

J. B. Clarke, for the plaintiff.

W. Cassels, Q.C. and A. C. Galt, for the defendant.

#### REGINA V. MATHESON.

*Conviction—Playing at game of faro—Recovery of penalty by action—12 Geo. II. ch. 28; 27 Geo. III. ch. 1.*

The defendant was convicted by the Police Magistrate of the City of Toronto, for playing at a game of cards called faro, contrary to the statute, 12 Geo. II. ch. 28, and fined £50 sfg. or ten days imprisonment.

*Held*, that under the subsequent Act, 27 Geo. III. ch. 1, prosecutions before justices of the peace were put an end to, and in lieu thereof the penalty was to be recovered by an action of debt, etc.

The conviction was therefore quashed.

*Quare*, whether the defendant could not have been convicted under the provisions against gambling in the Municipal Act, 46 Vict. ch. 18, sec. 490, sub-sec. 33, and the by-law in force in municipality.

Fenton, for the crown.

McMichael, Q.C. and Bigelow, for the defendant.

#### BRADLEY V. MACINTOSH.

*Libel—Production of documents relating to public service—New trial.*

In an action for libel and slander, the plaintiff's counsel insisted on the production of certain anonymous letters written by the defendant to the Ontario Government, relating to the

licensing of a public-house. The Head of the proposed department declined to produce the letters on the ground that their production would be injurious to the public service, and they were therefore privileged. The learned judge at the trial, as plaintiff's counsel insisted on the production, ordered them to be produced, but stated that if the court should hold that the production was not compellable, any verdict recovered would go for nothing. The letters were then produced and read. The learned judge told the jury that the letters were not evidence of libel, because they were privileged, but that they would be looked upon as evidence of malice on the slander count.

*Held*, that the question whether the production of documents is injurious to the public service, must be determined not by the judge, but by the head of the department having the custody of the papers, and if he is in attendance, and states as his opinion that the production of the documents would be injurious to the public service, the judge ought not to compel the production of them.

Under the circumstances the court set aside the verdict and granted a new trial.

J. K. Kerr, Q.C., for the plaintiff.

Delamere, for the defendant.

#### DONOVAN V. HERBERT.

*Trespass—Possession.*

The actual occupation of land by a person who has the legal title is not necessary to enable him to maintain trespass. It is sufficient if he enter upon the land so as to put himself in legal possession of it.

The plaintiff, the owner of certain land entered thereon and put up a board which stated that the land was for sale.

*Held*, that this was an act, which showed the intent of the plaintiff to be, to claim the land as owner, and constituted a sufficient entry to vest the legal possession in him, to enable him to maintain trespass.

The defendant in this action claimed that he acquired a title by possession.

*Held*, that the evidence, set out in the case, failed to establish such possession.

McMichael, Q.C., for the plaintiff.

McCarthy, Q.C., and O'Donohoe, Q.C., for the defendant.

## PAGE V. PROCTOR.

*Contract—Sale of rails—"Ordinary sections"—  
Right of selection—Parol evidence—admissibility  
of—Usage of trade.*

The plaintiffs in the beginning of January, 1880, had purchased through C. & G., of Montreal, a quantity of rails, and, requiring 2,000 tons more, negotiations were entered into between H., plaintiff's agent, C. & G., and defendant, which resulted in an advice note being signed on 14th January by C. & G., addressed to defendant advising him that they had sold to plaintiffs on defendants' account 2,000 tons of rails (56 lbs.), etc., at £8 18s. 9d. sterling per ton, payment to be made in London against documents. Credit to be then opened with approved bankers in favour of the defendant's agent. The defendant who was then in Montreal signed a sale-note on similar terms to above. The sale was immediately communicated to plaintiffs, who signed a confirmatory note, adding the words that the makers were to be either Ebbville or Moss Bay; and wrote across the face that the rails were to be 56 lbs., ordinary section and specification. This confirmatory note was not communicated to defendants until after this action was brought. The credit was opened by plaintiffs in accordance with the contract. The plaintiffs and defendant were dealers in, and not manufacturers of, rails. The defendant, at the time the contract was entered into, had purchased rails from a firm in England who were also dealers and not manufacturers, and who had arranged with the manufacturers at Ebbville for the manufacture of rails of a section known as "Hamilton and North-Western," and which came within the terms "ordinary sections," which embraced a number of different kind of sections, and these were the rails which the defendant intended delivering to plaintiffs. The plaintiffs required a section called "Sandberg," which also came within the term "ordinary sections," and when they discovered that the defendant's rails were Hamilton and North-Western they endeavoured to get defendant to change the section, which defendant was unable to do. The plaintiffs allowed the rails to be shipped to them and to be paid for under the credit, and it was not until after that that they notified

defendant of their refusal to accept, contending that under the contract they had the right to select the rails.

*Held*, that even if the terms of the confirmatory note were embraced in the contract, the contract did not *per se* give the plaintiffs the right of selection; and that parol evidence was not admissible to shew that by usage of trade they had such right; but, even if admissible, the evidence failed to establish such right, and especially so as the parties were dealers and not manufacturers, and in view of plaintiff's conduct. The contract was therefore performed by the section delivered.

*Hector Cameron, Q.C., and Bethune, Q.C., for the plaintiffs.*

*Robinson, Q.C., and McCarthy, Q.C., for the defendant.*

## NELLES V. MULLBY.

*Assignment for creditors—Partnership and separate creditors—Execution of assignment—Omission of goods therefrom—Preference.*

Under an assignment in trust for creditors the assignee now decided to distribute the proceeds of the property assigned, "rateably and proportionably among all the creditors of the assignees, in payment and satisfaction, as far as possible, of their just debts, having due regard to the rights of partnership creditors and private creditors, and distributing the same as between them according to law."

*Held*, assignment valid: that it provided for the payment of both partnership and separate creditors out of the respective estates appointed for that purpose according to law, and what that means is well known in insolvency proceedings: in administration of estates in the public courts: in the execution of writs by the sheriff; and in every days' proceedings under trust and composition deeds.

The assignment was executed by one of the partners for a co-partner under verbal instructions from the co-partner before leaving for England to sign for him if an assignment became necessary; and also under a cablegram received from him while in England to same intent.

*Held*, that though authority to execute a deed must be by deed, this would not apply to the goods in the assignee's store of which

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## NOTES OF CANADIAN CASES—CORRESPONDENCE.

the assignee took actual possession, as without it verbal authority would be insufficient; nor for like reason would goods warehoused for, and held by a bank, where the assignee notified the bank, of the assignment, and they agreed to hold the surplus for the assignee after payment of the bank's claim.

*Held* also, that the omission of some part of the assignee's estate from the assignment does not render it invalid.

*Held* also, the postponing the assignment until certain favoured creditors had obtained judgment deed execution did not invalidate the assignment.

*Gibbons*, for the plaintiff.

*Street*, Q.C., for the defendant.

## PRACTICE.

Ferguson, J.]

[Sept. 2, 1883.]

EDWARDS V. PEARSON.

*Costs—Costs in the cause—Taxing officer—Rule 442 O. J. A.*

When costs are made costs in the cause by an order of the Master in Chambers, a taxing officer cannot disallow them under the powers vested in him by Rule 442, O. J. A.

*Dominion, etc., Co. v. Stinson*, 9 P. R. 177 distinguished.

*Black*, for the plaintiff.

*Hoyles*, contra.

## CORRESPONDENCE.

## CLERK'S FEES ON TRANSMISSION OF PAPERS TO THE JUDGE.

To the Editor of the LAW JOURNAL.

SIR,—Sometime since I was speaking to you about a question of clerks charging fee of twenty-cents, under item 23 of the tariff of 1880, as established by the County Court Judges as the fees to be charged by clerks, and you kindly said you would insert any remarks I might wish to make in one of your issues.

The case in which I wish you to give an opinion, is one of this kind: You are aware that rule 161 of O'Brien's Division Court Manual of 1879, page 323, reads thus: "When upon the application of any plaintiff having an unsatisfied judgment in his

favour, a transcript of the entry of such judgment under section 139, or a transcript of the judgment under section 142 of the Act, is issued from the Court in which the judgment has been recovered, an entry thereof shall be made by the clerk in the Procedure Book, and no further proceedings shall be had in the said Court upon the said judgment, without an order from the judge."

Under this rule an application was made to a judge *ex parte*, on affidavit for leave to proceed in the home county, in a suit where the transcript had been sent to Hamilton for enforcement, and had been returned to the home Court, say at Toronto, *nulla bona*, the defendant having moved back to the original county where he was served. The plaintiff, wishing to proceed, made the necessary affidavit that the judgment was unpaid, and the defendant again in the county where he was originally served, and got the judge's order in Chambers endorsed on said special affidavit. The plaintiff took the affidavit to the clerk's office, and asked him to enter the judge's order as endorsed upon the affidavit, allowing further proceedings to be taken in the original Court, and tendered the clerk fifteen cents for the entry of the order, but the clerk demanded twenty cents for the transmission of the affidavit to the judge independent of the said fifteen cents.

The clerk would not enter the order unless he was paid this extra twenty cents, and the plaintiff paid the twenty cents, under protest, to the clerk.

Now you will see that the affidavit referred to was never in the clerk's hands, nor transmitted by him in any way, nor was the judge's order obtained through his procurement. He did not earn the twenty cents by any act which he had done; the only act done on his part being the entry of the judge's order, endorsed on said affidavit. The question involved is: Has a clerk the right to charge under said item 23 of the tariff of 1880, twenty cents for work which in fact he never did, and is a plaintiff in the Division Court obliged to take every affidavit in which he makes a chamber application, to the clerk's office first, and have him transmit the affidavit to the judge for his order, and pay him twenty cents for this particular transmission?

You will easily see that there are many chamber applications which may be made to the judge on the spur of the moment, as for instance, for a garnishee order (which was in fact the cause of the application in this particular case), or in a case of an application for an order to replevy goods where there is no danger of losing them, or in the case of an application for an order for substitutional service. Is a plaintiff in such cases obliged to leave

## CIRCUITS.

his papers with the clerk to transmit to the judge? or if not left with the clerk to transmit, has the clerk a right to charge twenty cents for work which he really never did, and which of course must come out of the defendant's pocket if he chooses to do so?

Your opinion in the LAW JOURNAL is respectfully requested concerning this matter, as it is one of public importance, and seriously affects defendants, and would put plaintiffs or attorneys acting for them to a very great inconvenience, and often to the danger of loss.

You will see that item 23 refers principally to the transmission of transcripts, and would cover cases like applications for a new trial where papers are required to be left with the clerk.

CHARLES DURAND,

Toronto, Feb'y 18th, 1884.

## CIRCUITS.

## SPRING CIRCUITS.

## EASTERN CIRCUIT.

*The Hon. Mr. Justice Rose.*

PEMBROKE ..... Tuesday ..... 11th March.  
PERTH ..... Tuesday ..... 18th March.  
CORNWALL ..... Tuesday ..... 25th March.  
OTTAWA ..... Tuesday ..... 1st April.  
L'ORIGNAL ..... Tuesday ..... 22nd April.

## MIDLAND CIRCUIT.

*The Hon. Mr. Justice Patterson.*

KINGSTON ..... Monday ..... 31st March.  
BROCKVILLE ..... Monday ..... 7th April.  
NAPANEE ..... Monday ..... 14th April.  
BELLEVILLE ..... Monday ..... 21st April.  
PICTON ..... Monday ..... 5th May.

## VICTORIA CIRCUIT.

*The Hon. Mr. Justice Cameron.*

BRAMPTON ..... Monday ..... 10th March.  
WHITBY ..... Monday ..... 17th March.  
PETERBOROUGH ..... Monday ..... 24th March.  
LINDSAY ..... Monday ..... 31st March.  
COBOURG ..... Thursday ..... 10th April.

## BROCK CIRCUIT.

*The Hon. The Chief Justice of the Common Pleas Division.*

ORANGEVILLE ..... Tuesday ..... 11th March.  
WOODSTOCK ..... Tuesday ..... 18th March.  
STRATFORD ..... Tuesday ..... 25th March.  
GODERICH ..... Tuesday ..... 1st April.  
WALKERTON ..... Tuesday ..... 8th April.  
OWEN SOUND ..... Tuesday ..... 15th April.

## NIAGARA CIRCUIT.

*The Hon. Mr. Justice Osler.*

MILTON ..... Monday ..... 31st March.  
CAYUGA ..... Monday ..... 7th April.  
WELLAND ..... Monday ..... 14th April.  
ST. CATHARINES ..... Monday ..... 21st April.  
HAMILTON ..... Monday ..... 28th April.

## WATERLOO CIRCUIT.

*The Hon. Mr. Justice Armour.*

BARRIE ..... Tuesday ..... 11th March.  
GUELPH ..... Tuesday ..... 18th March.  
BERLIN ..... Tuesday ..... 25th March.  
BRANTFORD ..... Wednesday ..... 2nd April.  
SIMCOE ..... Monday ..... 7th April.

## WESTERN CIRCUIT.

*The Hon. Mr. Justice Burton.*

ST. THOMAS ..... Monday ..... 31st March.  
SARNIA ..... Tuesday ..... 8th April.  
CHATHAM ..... Monday ..... 14th April.  
SANDWICH ..... Tuesday ..... 22nd April.  
LONDON ..... Thursday ..... 1st May.

## HOME CIRCUIT.

*The Hon. The Chief Justice of the Queen's Bench Division.*

1. CIVIL COURT ..... Tuesday ..... 18th March.  
2. CRIMINAL COURT. Tuesday ..... 22nd April.

## CHANCERY SPRING CIRCUITS.

## TORONTO.

*The Hon. Mr. Justice Proudfoot.*

TORONTO ..... Thursday ..... 24th April.

## WESTERN CIRCUIT.

*The Hon. The Chancellor.*

STRATFORD ..... Monday ..... 17th March.  
GODERICH ..... Thursday ..... 20th March.  
WOODSTOCK ..... Thursday ..... 17th April.  
LONDON ..... Tuesday ..... 22nd April.  
SARNIA ..... Tuesday ..... 20th May.  
SANDWICH ..... Friday ..... 23rd May.  
CHATHAM ..... Wednesday ..... 28th June.  
WALKERTON ..... Wednesday ..... 4th June.

## HOME CIRCUIT.

*The Hon. Mr. Justice Proudfoot.*

BRANTFORD ..... Monday ..... 10th March.  
SIMCOE ..... Friday ..... 14th March.  
ST. CATHARINES ..... Wednesday ..... 19th March.  
WHITBY ..... Monday ..... 24th March.  
BARRIE ..... Thursday ..... 27th March.  
OWEN SOUND ..... Wednesday ..... 2nd April.  
GUELPH ..... Monday ..... 7th April.  
HAMILTON ..... Monday ..... 14th April.

## EASTERN CIRCUIT.

*The Hon. Mr. Justice Ferguson.*

BELLEVILLE ..... Wednesday ..... 26th March.  
COBOURG ..... Thursday ..... 3rd April.  
PETERBOROUGH ..... Tuesday ..... 8th April.  
LINDSAY ..... Monday ..... 14th April.  
OTTAWA ..... Tuesday ..... 29th April.  
CORNWALL ..... Monday ..... 5th May.  
BROCKVILLE ..... Thursday ..... 8th May.  
KINGSTON ..... Tuesday ..... 13th May.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

MICHAELMAS TERM, 47 Vict., 1883.

During this term the following gentlemen were entered on the books of the Society as Students-at-Law, namely:—

Graduates—Thomas Francis Lyall, William George Hector McAllister, Charles Joseph McCabe, John Shaw Skinner, Walter Stephen Harrington, Francis Norman Raines.

Matriculants—Donald Reginald Anderson, Edward Peel McNeil, Charles Elliott, Isaac Benson Lucas, William Francis Bannerman, Frederick Bernard Featherstonhaugh, David Stevenson Wallbridge, Frederick Clarence Jarvis, Ira Standish, William Patrick McMahon.

Juniors—Ashman Bridgman, Hugh Crawford Rose, Colin McIntosh, Walter A. Thrasher, David Alexander Dunlop, Francis Brown Denton, Magloire Raoul Routhier, Heber Stuart Warren Livingston, John Alexander Chisholm, Paul Jarvis, Marcus Herbert Simpson, Thomas Scullard, John Harper.

The following gentlemen were called to the Bar, namely:—

George Kappeler, honour man and gold medalist; Cornelius Arthur Masten, Robert Alexander Porteous, James Arthur Mulligan, John Soper McKay, William John Taylor, Thomas Chapple, Charles Macdonald, Rufus Adams Coleman, Chauncy Giles Jarvis, Fernando Elwood Titus, Archibald James Reid, Alexander Mackenzie, William Henry Barry, Edwin Bell, William John Wallace, John Johnstone Anderson Weir, James Garbutt, Ferguson James Dunbar.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

## Articled Clerks.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

## Students-at-Law.

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar.

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnehose, Lazare Hoche.

## OR NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

## FIRST INTERMEDIATE.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

1884  
and  
1885.

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

## FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

## FOR CALL.

Blackstone, vol. 1, containing the introductions and rights of Persons; Pollock on Contracts, Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

## CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions impowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Thursday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of Service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## FEES.

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above ..	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

# Canada Law Journal.

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## DIARY FOR MARCH.

16. Sun... *3rd Sunday in Lent.*  
17. Mon... St. Patrick's Day.  
18. Tue... Princess Louise born, 1834.  
23. Sun... *4th Sunday in Lent.* Sir George Arthur Lieut.-Gov.  
U. C., 1838.  
28. Fri... Canada ceded to France, 1632.  
29. Sat... The Wills Act assented to, 1873.  
30. Sun... *5th Sunday in Lent.* B. N. A. Act assented to, 1867.  
31. Mon... Lord Metcalfe, Governor-General, 1854.

TORONTO, MAR. 15, 1884.

WE have received Vol. I, of Mr. G. S. Holmsted's General Rules, and Orders of the Courts of Law and Equity, of the Province of Ontario, passed prior to the Ontario Judicature Act, 1881, and now remaining in force, comprising the Chancery Orders, and without presuming to write anything approaching a review of the work at this early stage, the perusal of some fifty pages is sufficient to justify us in speaking in the highest terms of the industry, ability and learning comprised in this work. To call it a compilation would be to display our own inability to appreciate what was involved in its composition. It involved in the first place a very thorough knowledge of the practice before the Judicature Act, and of the practice since the Judicature Act, and then the power of detecting how much of the former was left unaffected by the latter; and it requires very little reflection to comprehend the mental effort which must in very many cases have been gone through by the learned writer, before he could record an opinion that this rule or that rule is still in force, with this or that modification. In our opinion the book is a credit not only to Mr. Holmsted, but to the legal profession in Ontario generally, and, at all events, the gratitude of the

latter is certainly due to the author for so valuable an addition to works on Practice. We look forward with, perhaps, greater interest to the publication of the second volume than we have to this one, and we venture to think its composition must be even a more difficult task than this has been. Be that as it may, it may perhaps be said that no legal work, at all events since Harrison's Common Law Procedure Act, has been published in this Province approaching these volumes of Mr. Holmsted in difficulty or in importance.

## DIFFERENCES OF PRACTICE UNDER THE JUDICATURE ACT.

WE have on former occasions adverted to the fact that, notwithstanding the obvious intention of the Judicature Act was to bring about an uniformity of practice in the various Divisions of the High Court, the traditions of the past have been too strong to be overcome even by an Act of Parliament. Hence it is that we find in the Queen's Bench and Common Pleas Divisions, the new procedure is construed and worked as nearly as may be in accordance with the former practice at law, while in the Chancery Division the same rules are construed and worked in accordance with the former practice in Chancery.

To take a very common point of practice namely, the entry of judgments: under the former common law practice it was a well recognized rule that their could only be one final judgment in the action against the same defendant. In certain cases a judgment might be entered against one defendant at one time, and

## DIFFERENCES OF PRACTICE UNDER THE JUDICATURE ACT.

against another defendant at another time, but only one final judgment could be entered against the same defendant. On the other hand in the Court of Chancery it was equally familiar practice that a decree could be pronounced against a defendant at one stage of the cause, disposing of part of the matters in controversy, and reserving further directions to a subsequent stage of the suit—usually after the Master had made his report as to certain matters referred to him—and upon the cause coming on again for hearing on further directions, the Court was accustomed to pronounce a further decree or judgment against the same defendant, either finally disposing of the remaining matters in controversy, or else disposing of some of them and again reserving “further directions” for future disposition. Thus, as often as the cause came on again, a fresh decree or judgment was pronounced; and in this way, in a Chancery suit, there might be several decrees or judgments pronounced in the same action against the same defendant before all the matters in litigation were finally disposed of, and this was necessary from the nature of the relief administered in Equity.

Now, in the Queen's Bench and Common Pleas Divisions, notwithstanding these Divisions are now in effect also Courts of Chancery, and have cognizance of purely equitable causes of action, the old common law theory, that there can be only one judgment, is still rigidly adhered to; while in the Chancery Division every decision rendered in an action, which under the former practice would be styled a decree, is now regarded as a judgment, and is so entered. Thus, in many cases in the Queen's Bench and Common Pleas Divisions, an order is issued, when, in the Chancery Division, in an exactly similar state of facts, a judgment is entered.

Then again when a motion for judgment is made under Rules 322 or 324, a wide

difference of procedure prevails. In the Queen's Bench and Common Pleas Divisions an order is drawn up authorizing the judgment to be entered in accordance with the decision of the Court, and after this order is issued a judgment is then drawn up in accordance with the order, and entered. On the other hand, in the Chancery Division the decision of the Court upon the motion is not formulated into an order to enter judgment, but the decision is formulated as a judgment which is thereupon entered without any preliminary order.

Under Rule 80, an order to enter judgment in accordance with the indorsement on the writ is the practice expressly prescribed by the Rule. But when a motion for judgment is made under Rules 211, 322, 324, the Court pronounces the judgment, and it would seem more in accordance with the intention of the Act and Rules that the document to be drawn up should be the judgment pronounced, and not a mere order to enter judgment. The practice of the Chancery Division in this respect has certainly less of circumlocution and greater simplicity than that adopted in the other divisions.

This is by no means a solitary point of practice in which a difference exists, and we think it is to be regretted. There are numerous other points in the administration of the Judicature Act and Rules in which the officers of the Court, relying on their former traditions, are practically creating a different system of practice in the different Divisions, and these differences are for the most part at present beyond judicial control, from the fact that the questions of difference can rarely come under the attention of the judges, and therefore their opinion as to what is the proper practice of two divergent methods cannot be obtained.

We believe that it will be very difficult to remedy this state of things, until the

## PROCEEDINGS OF HILARY TERM, 1884.

whole of the offices at Osgoode Hall are under one head having a certain amount of autocratic power to settle differences of this kind.

In the meantime, if one of the judges of the Supreme Court having sufficient familiarity with the former practice, both at law and in equity, were to be appointed authoritatively to settle the proper practice to be pursued in all the Divisions, wherever any divergence in practice is found to exist, we think it would be beneficial to the profession, and likely in the long run to lead to the much desired uniformity of practice in all the Divisions which the Judicature Act aimed to bring about.

## LAW SOCIETY.

## HILARY TERM, 1884.

The following is the *resumé* of the proceedings of the Benchers during Hilary Term, published by authority:—

During this term the following gentlemen were called to the Bar, namely: J. Bicknell, Jr., Gold Medallist, with honours, and G. W. Marsh, D. C. Ross, J. Y. Cruikshank, E. J. Hearn, W. C. Livingstone, R. W. Witherspoon, G. F. Cairns, F. S. Wallbridge, M. McFadden, F. A. Munson, D. Urquhart, E. G. Porter, J. Burdett, A. M. Grier, E. Campion, and J. J. MacLaren. These names are arranged in the order in which the candidates were called, and not in their order of merit.

The following gentlemen received certificates of fitness; namely: D. C. Ross, W. G. Thurston, G. H. Anderson, C. A. Masten, A. C. Muir, J. Y. Cruikshank, E. Sweet, G. F. Cairns, E. Guss Porter, J. W. Russell, J. Burdett, W. C. Livingstone, G. Smith, C. G. Jarvis, A. M. Grier, W. J. Wright, T. M. Best, J. Strange, A. C. Beasley, F. W. Garvin, W. A. Werrett, M. S. McCraney. These names are arranged in the order of merit.

The following gentlemen passed the

first Intermediate Examination, namely: E. Bristol, 1st scholarship, with honours; A. E. Swartout, 2nd scholarship, with honours; G. H. Kilmer, 3rd scholarship with honours; R. H. J. Pennefather, G. W. C. Campbell, A. M. Lafferty, H. Macbeth, L. H. Baldwin, W. E. Tisdale, A. Dodds, D. H. Cole, R. Sharpe, Eli Hodgins, Walter Hunter, W. S. Herrington, Wm. Morris, J. A. McLean, G. McPhillips, A. A. McTavish, R. T. Sutherland, T. F. Johnson, G. W. Burton, S. C. Mewburn.

The following gentlemen passed the second Intermediate Examination, namely: A. C. Macdonell, 1st scholarship, with honours; W. E. S. Knowles, 2nd scholarship, with honours; J. F. Williamson, C. F. Farewell, J. Thacker, A. K. Goodman, F. E. Nelles, D. Alexander, G. E. Evans, G. E. Kidd, C. R. Atkinson, H. Brock, James Miller, L. M. Hayes, G. E. Martin, A. McKellar, D. Fasken, J. E. O'Meara, F. Lawrence, John Geale, J. McNamara, T. H. Stoddart, A. B. Shaw.

The following gentlemen were admitted into the Law Society as students-at-law, namely:

*Matriculants of Universities.*

J. F. Gregory, W. E. Kelley, W. W. Dingman, J. H. Hegler.

*Junior Class.*

M. H. Ludwig, F. Smoke, J. B. McColl, R. W. G. Dalton, J. J. McPhillips, F. Rohleder, P. K. Halpin, J. W. Coe.

MONDAY, 4TH FEB., 1884.

Present—Messrs. Hoskin, Murray, MacKelcan, J. F. Smith, Foy, Irving, Hon. C. F. Fraser, Moss, Cameron, McMichael, Britton. Mr. Irving in the chair.

Mr. Murray, on behalf of the Finance Committee, presented the following report of the Committee, together with the estimate for the current year and the balance sheet for 1883, referred to in it.

The Finance Committee beg leave to report as follows:—

1. The Committee beg to call the attention of Convocation to the very close approach to a balance of the income and expenditure. It is true that the whole amount of the charge of the Triennial Digest comes against the income of the year, while two thirds, if not the whole, of that amount

## PROCEEDINGS OF HILARY TERM, 1884.

is properly a charge on the revenue of previous years.

But the Committee are of the opinion that the balance, considering the fluctuating character of the receipts and the possible expenditure connected with the fuel, light and water arrangements for the future, is too small.

2. The cost of the reports has been greatly increased.

Convocation has established a Digest, the yearly charge for which is estimated at from \$800 to \$900. It has appointed an additional reporter at a salary of \$1,200—it is probable that this appointment will result in another volume of reports at a cost of \$1,710, and the printing of the reports of the election cases will add to the charge for reports, so that in round figures, an increase of about \$4,000 a year has been made on this head.

The Committee beg to renew the suggestion made some time ago that the reports of the Supreme Court should be discontinued, as these reports are those least valuable to the average practitioner, and their discontinuance will effect a saving of nearly \$1,800 a year to set against the above increases.

It appears to the Committee that, in the face of such discontinuance, Convocation should subscribe for, say, eight copies for Osgoode Hall, and one copy for each county library, but should not pay for any officials.

It must be remembered that the cost will be greatly enhanced by the diminished subscription, and to pay for the copies for the judges would probably involve an expense of nearly \$800 a year.

It is probable that conjoint action on the part of those members of the bench and bar who desire these reports, would result in their being obtained at a more moderate rate, and the reporters of the Law Society could be directed to publish abstracts of the important decisions of the Ontario Appeals to the Supreme Court and Privy Council.

It also appears to the Committee that the notes of cases if supplied to whichever of the two legal periodicals which would undertake to publish them promptly, or to both, if both would so undertake, might be published free of expense. They are of value to the journals. The expense last year was \$490, and the Committee think that an effort should be made to save it.

3. The treasurer and the chairman of the Committee have been in communication with the Attorney-General, and it is believed that the wishes of Convocation, as to the termination of the present arrangement for supplying fuel, light and water to the Government part of Osgoode Hall will be accomplished.

The present estimates are made on this basis.

The extravagant charge for water supplied to the east wing during the last quarter has led the Committee to consider the advisability of obtaining an independent supply if no adequate redress can be obtained.

(Signed) D. B. READ,  
Chairman.

## ESTIMATES OF RECEIPTS AND EXPENDITURE FOR 1884.

*Receipts.*

Certificate and Term Fees..	\$17,300 00
Notice Fees .....	625 00
Attorney Examination Fees	5,500 00
Students' Admission Fees...	6,750 00
Call Fees .....	8,500 00
Interest and Dividends....	2,500 00
Government payment for heating, lighting and water	2,000 00
Sundries:	
Commission and Fees on Telegraph and Telephone .....	275 00
Reports sold including digest.....	950 00
Fees on Petitions Diplomas and Certificates....	150 00
	<u>\$44,550 00</u>

*Expenditure.*

Reporting:	
Salaries .....	\$8,600 00
Postage ....	105 00
Printing.....	7,850 00
Supreme Court Reports..	1,800 00
Notes, Law Journal.....	90 00
Appropriation for Digest..	1,000 00
Printing Digest .....	1,400 00
Postage on Digest.....	100 00
Insurance on Reports....	100 00
	<u>21,045 00</u>

## Examinations:

Salaries.....	\$3,200 00
Scholarships.....	1,600 00
Printing and Stationery..	250 00
Medals .....	120 00
Law School Prizes .....	50 00
Examiners for Matriculation .....	300 00
Law Journal account.....	100 00
	<u>5,620 00</u>

## Library:

Books, Binding and Repairs.....	2,800 00
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## General Expenses:

Secretary, Sub-Treasurer and Librarian .....	2,000 00
Assistants.....	1,200 00
Housekeeper .....	360 00
	<u>3,560 00</u>

## Lighting, Heating, Water and Insurance:

Engineer and Assistant (5 months) .....	\$425 00
Gas .....	630 00
Water.....	843 00
Weighing Coal.....	5 00
Fuel.....	853 00
Repairs to Apparatus....	300 00
Carting Coal and cutting.	
Wood .....	75 00
	<u>3,131 00</u>

## PROCEEDINGS OF HILARY TERM.

## Grounds:

Furnace Man, Gardener and Assistant.....	\$500 00	
Tools .....	5 00	
Cartage .....	60 00	
Water for Lawn .....	34 00	
Snow Clearing .....	40 00	
		639 00

## Sundries:

Gas for Cook Stove.....	\$50 00	
Auditor.....	100 00	
Postage .....	30 00	
Telephone Rent.....	100 00	
Clocks .....	10 00	
Ice .....	15 00	
Term Lunches .....	400 00	
Cleaning Windows.....	34 00	
Guarantee Co.....	20 00	
Dusting Books.....	18 00	
P. O. Box .....	6 00	
Telephone Operator .....	432 00	
Telephone boy .....	96 00	
Telephone Messages .....	8 00	
Resumé .....	40 00	
Repairs to Furniture .....	50 00	
New Furniture.....	300 00	
Repairs to Walks in grounds.....	300 00	
Law Costs .....	1,000 00	
Removing Matting .....	40 00	
Unforeseen Expenses .....	200 00	
Stationary.....	240 00	
		3,489 00

## Extraordinary Expenditure:

Furnace for East Wing .....	400 00
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## County Library Aid:

Brant .....	\$178 00	
Ontario .....	276 00	
Hamilton .....	288 00	
Middlesex .....	240 00	
Bruce .....	206 00	
Frontenac .....	204 00	
Peterborough .....	224 00	
		1,616 00

\$42,300 00

## ABSTRACT OF BALANCE SHEET FOR 1883.

## Receipts.

Certificates and Term Fees..	\$17,040 00	
Less Returned Fees.....	98 75	
		16,941 25
Notice Fees .....		657 00
Attorneys' Examination Fees	8,139 00	
Less returned Fees.....	1,755 00	
		6,384 00
Students' Admission Fees...	7,270 00	
Less Returned Fees.....	360 00	
		6,910 00

Call Fees.....	\$12,070 00	
Less Returned Fees.....	3,130 00	
		8,940 00
Interest and Dividends .....	2,611 22	
Government Payment for Heating, Lighting and Water ..	4,250 00	
Amount received for Reports sold.....	392 44	
Sundries:		
Telephone Commission and Fees on Telephone Messages .....	243 74	
Fees on Petitions, Diplomas and Cer- tificates of Admission.....	155 00	
		<u>\$47,484 65</u>

## Expenditure,

## Reporting:

Salaries .....	\$7,239 28	
Postage .....	103 00	
Printing .....	5,604 02	
Supreme Court Reports..	1,800 00	
Notes for Law Journal....	487 37	
Hodgins' Reports.....	3,260 00	
		18,493 86

## Examinations:

Salaries .....	3,200 00	
Scholarships .....	1,380 00	
Printing and Stationery..	295 25	
Examiners for Matricula- tion .....	219 00	
Medals.....	49 25	
Prizes in Law School ....	25 00	

5,169 50

## Library:

Books, Binding and Repairs.....	3,356 70
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## General Expenses:

Secretary, Sub-Treasurer and Librarian.....	2,000 00	
Assistants.....	1,243 44	
Housekeeper .....	360 00	

3,603 44

## Lighting, Heating, Water and Insurance:

Engineer and Assistant...	680 00	
Gas.....	823 01	
Water .....	1,366 27	
Insurance.....	90 00	
Weighing Coal .....	10 00	
Fuel .....	3,078 58	
Repairs to Apparatus. ...	63 48	
Carting Coal and cutting Wood.....	130 77	

6,242 11

## Grounds:

Gardener and Assistant..	340 00	
Tools.....	33 35	
Cartage.....	10 25	
Labour.....	242 50	
Snow Clearing .....	62 13	
Trees.....	9 00	

697 23

## PROCEEDINGS OF HILARY TERM.

## Sundries:

Postage.....	\$26 32
Advertising .....	258 75
Stationery.....	233 70
Law Costs.....	1,233 57
Repairs.....	472 65
Furniture .....	130 25
Term Lunches.....	737 82
County Library Aid.....	1,616 00
Guarantee Co.....	20 00
Oiling Portraits.....	27 50
P. O. Box .....	6 00
Hay & Co.....	5 20
Telephone Operator.....	4 32
Messengers .....	147 81
Labour .....	9 00
Wilson .....	9 10
J. Daly, as Substitute....	280 00
Hicks .....	12 65
Staunton (screen) .....	6 00
Bell Telephone Rent ....	100 00
Sparrow .....	10 89
Ellis (clocks).....	18 00
Crockery .....	100 55
C. L. Journal.....	40 00
Repairing Portrait....	30 00
S. E. Roberts .....	16 33
P. Read.....	8 50
Dusting Books .....	17 18
Oiling Floor .....	16 25
Cutlery .....	3 75
Resume .....	5 00
Auditor .....	100 00
Petty Charges .....	31 27
Balance.....	6,162 04
	3,750 77
	<u>\$47,484 65</u>

Audited and found correct.

16th January, 1884.

(Signed) HENRY WM. EDDIS,  
Auditor.

Ordered that the above report be considered on Saturday, 9th February.

The petition of Elgin Schoff and one hundred others, in reference to the conduct of the examinations, was referred to the Legal Education Committee.

Mr. David Haskett Tennant, who passed his examination in Trinity Term, 1883, was granted a certificate of fitness.

TUESDAY, 5TH FEB., 1884.

Present—Messrs. Foy, Hoskin, Kerr, Martin, Irving, Murray, Hardy, MacLennan.

Mr. Irving in the chair.

The report for 1883 of the Solicitor of the Society was received and read.

The report of the Library Committee was received and read.

A letter from Mr. Patteson, the Postmaster, proposing to place a collection letter box in Osgoode Hall, was read, and the secretary was directed to thank Mr. Patteson for the very convenient arrangement he proposed.

The secretary laid on the table the list of Benchers forming the standing committees, corrected to date, as follows:

*Legal Education.*—Alex. Leith, Esq., J. H. Ferguson, Esq., Chas. Moss, Esq., John Hoskin, Esq., James F. Smith, Esq., D. Guthrie, Esq., Hon. T. B. Pardee, F. MacKelcan, Esq., John Crickmore, Esq.

*Finance.*—J. J. Foy, Esq., John Crickmore, Esq., E. Martin, Esq., Hon. S. H. Blake, L. W. Smith, Esq., H. W. M. Murray, Esq., W. R. Meredith, Esq., Hon. A. S. Hardy, D. B. Read, Esq.

*Library.*—James Bethune, Esq., Hector Cameron, Esq., James Beaty, Esq., Dr. McMichael, J. H. Ferguson, Esq., Charles Moss, Esq., Hon. S. H. Blake, A. Irving, Esq., John Bell, Esq.

*Reporting.*—James Bethune, Esq., B. M. Britton, Esq., Hector Cameron, Esq., D. McCarthy, Esq., James F. Smith, Esq., E. Martin, Esq., James MacLennan, Esq., H. C. R. Beecher, Esq., F. MacKelcan, Esq.

*Discipline.*—Alex. Leith, Esq., James MacLennan, Esq., James Beaty, Esq., J. K. Kerr, Esq., Thos. Robertson, Esq., E. Martin, Esq., Dr. McMichael, John Hoskin, Esq., H. C. R. Beecher, Esq.

*County Library Aid.*—A. Hudspeth, Esq., Hector Cameron, Esq., W. R. Meredith, Esq., Thos. Robertson, Esq., B. M. Britton, Esq., Hon. A. S. Hardy, E. Martin, Esq., J. K. Kerr, Esq., H. C. R. Beecher, Esq.

*Journals of Convocation.*—Hon. C. F. Fraser, J. J. Foy, Esq., James MacLennan, Esq., Hon. T. B. Pardee, J. K. Kerr, Esq., John Hoskin, Esq., Charles Moss, Esq., D. McCarthy, Esq., B. M. Britton, Esq.

SATURDAY, 9TH FEBRUARY, 1884.

Present—Messrs. Crickmore, Moss, MacLennan, Murray, Foy, Irving, Bell, Kerr, Hoskin, Robertson, MacKelcan and Martin.

In the absence of the treasurer, Mr. Bell was elected chairman.

The Legal Education Committee, by the chairman, Mr. Crickmore, reported

## PROCEEDINGS OF HILARY TERM.

on the case of Mr. W. E. S. Knowles recommending that he be awarded honours and the second scholarship of sixty dollars, and that he be allowed to present himself for certificate of fitness in the Michaelmas Term, 1884.

The report was read and received, ordered for immediate consideration, and adopted and ordered accordingly.

The Reporting Committee presented the following report, which was received and read.

The Committee on Reporting beg leave to report as follows:

1. The work of reporting is in a fairly satisfactory condition. There are still seventy cases in the Chancery Division unreported, in which judgment was given before the end of the year 1883, and twenty-five cases in which judgment has been given in the present year.

2. There are sixteen cases in the Court of Appeal unreported which should have been out months ago, but in other respects the Appeal reporting is now greatly improved.

3. The work in the other divisions is entirely satisfactory.

4. The Committee, after very careful consideration, recommend the discontinuance of the subscription to the Supreme Court reports on financial grounds. They advise the subscription for eight copies for the Osgoode Hall library and seven copies for the county libraries.

5. Your Committee also recommend on financial grounds, that only one thousand copies of the triennial Digest be printed, and that they be sold to the profession under the direction of the Reporting Committee at a cost not exceeding three dollars per copy.

6. Your Committee further recommend for the same reason to discontinue the contract with Mr. O'Brien for the publication of early notes after the expiration of the current quarter at the end of March. The Committee, however, recommend that the notes be furnished to Mr. O'Brien as heretofore in case he should desire to publish them free of charge to the Society.

7. Your Committee recommend that rule 114 be amended by providing for a quarterly instead of a monthly certificate by the editor.

All of which is respectfully submitted.

(Signed) JAMES MACLENNAN,  
*Chairman.*

February 9th, 1884.

Ordered that the report be considered clause by clause.

First five clauses were carried: The following amendment was moved to the sixth clause, namely:

That the further consideration of the sixth clause be postponed till next term and that in the meantime the Committee be

instructed and authorized to see what, if any, arrangement can be made with Mr. O'Brien for the publication in the LAW JOURNAL of early notes of Supreme Court decisions.

The amendment was carried.

The adoption of clause seven was then moved and was lost.

The consideration of the report of the Finance Committee appointed for to-day was then proceeded with, clause by clause.

The first clause was adopted.

The second clause was adopted subject to the expression or action of Convocation on the report of the Reporting Committee, adopted this day.

The third clause was adopted.

Ordered that the post-office box be discontinued and that a distribution box be placed in the hall.

The report of the solicitor of the Society was referred to the Finance Committee.

The report of the County Libraries Aid Committee was received and adopted.

On the motion of Mr. Martin, seconded by Mr. Maclellan, it was ordered that the estimates for the year 1884 be received and approved.

FRIDAY, FEBRUARY 15TH, 1884.

Present—Messrs. Britton, Hudspeth, Murray, J. F. Smith, Crickmore, Irving, McMichael, Robertson, Fraser, Kerr, Maclellan, Foy, Meredith and Moss.

In the absence of the Treasurer, Mr Irving was appointed chairman.

The Treasurer, the Hon. E. Blake, entered the room.

Mr. Crickmore, from the Legal Education Committee, reported on the petition of Elgin Schoff and others as to the further examination of candidates who have failed on some subject, recommending that the prayer of the petition be not granted. Adopted.

Mr. Crickmore reported from the Legal Education Committee as follows:

"The Committee beg leave to draw the attention of Convocation to the fact that notices had been given of application to the Ontario Legislature for two private Bills, to authorize the Supreme Court to admit John Robertson Miller and Delos R. Davies to practise as solicitors."

(Signed) JOHN CRICKMORE.  
*Chairman.*

The report was read and received, and ordered to be considered, and adopted.

Resolved unanimously that, in the opinion of Convocation, no special Acts should be passed authorizing calls to the Bar or admission to practise as a solicitor, but all calls and admissions should be authorized by Convocation, under the authority of the general law and under such general regulations as may be prescribed, and that the Legal Education Committee be appointed a committee to confer with the Attorney-General on the subject of this resolution.

The letters respecting a gentleman practising without authority were read, and ordered that they be referred to the Discipline Committee to make the usual enquiries and report.

Mr. Murray, pursuant to notice, moved as follows:

That the secretary be directed to place in the book case, for students, one copy of those books which are on the curriculum for the law examinations for degrees at the universities of Toronto and Trinity College, of which there are two or more copies in the library. The Library Committee to decide as to the books to be so placed and as to the length of time to be allowed for their perusal.

Ordered that the motion be referred to the Library Committee for consideration and report.

Mr. Hudspeth gave notice of a motion, for the first Tuesday of next Term with reference to Term Lunches.

Convocation adjourned.

J. K. KERR,

Chairman of Committee of Journals of Convocation.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

### QUEENS BENCH DIVISION.

Hagarty, C.J.]

[Jan. 22.]

REGINA V. HOWARD.

*Municipal by-laws—Fire limits—Repairing  
wooden buildings—Ultra vires.*

A city corporation passed a by-law under R. S. O. ch. 174, sec. 467, s. s. 6, which defined fire limits, within which buildings were to be of incombustible material, the roofs to be of certain metals, or slate, or shingles laid in mortar not less than half an inch thick, and no roof of any building already erected within the fire limits was to be relaid or recovered except with one of the enumerated materials. The defendant was convicted of a breach of this by-law, for having laid new shingles on his wooden house within the fire limits, without laying them in mortar. The house had been standing for many years before the by-law was passed.

*Held*, that the by-law was *ultra vires*, in so far as it referred to existing buildings or ordinary repairs or changes thereof, not being additions thereto.

*Clement*, for defendant.

*MacKelcan*, Q.C., contra.

Wilson, C.J.]

[January.]

IN RE MACKENZIE AND THE CORPORATION  
OF THE CITY OF BRANTFORD.

*Municipal council—Public Health Act—Powers  
thereunder—By-law—Validity of—Delegation  
of powers.*

The members of the council of any municipality are Health Officers of the municipality by virtue of the Public Health Act, R. S. O. ch. 190, and as such they may enforce the provisions of secs. 3 to 7 of that Act without by-law, but if they delegate their powers to a committee, they must do so by municipal

Q.B. Div.]

NOTES OF CANADIAN CASES.

[Q.B. Div.]

by-law. They cannot, however, delegate any powers except those which they exercise under the Public Health Act.

A by-law was passed by the Municipal Council of the city of Brantford, regulating the cleansing of privy-vaults, and imposing a fine of not less than \$1, nor more than \$50 for a breach of its provisions.

*Held*, valid as the by-law was one under the Municipal Act, and not under the Public Health Act, which restricts the penalty to \$20.

The by-law, as set out below, was objectionable as delegating to persons not members of the council, the Board of Health, the powers which as municipal matters belonged exclusively to the council.

*Beck*, for the motion.

*Wilkes*, contra.

#### IN BANCO.

#### ROBERTSON V. HAMILTON PROV. AND LOAN SOCIETY.

*Mortgagor and mortgagee—Short forms Act—  
Distress for arrears—Leave and license.*

Defendant company were mortgagees of plaintiff's land, under the Short Forms Act, the mortgage containing this clause: "Provided the Society may distress for arrears of instalments." The principal and interest were added together, and, by the mortgage, the amount was repayable by equal annual instalments. There was also a covenant to pay interest in arrear and for interest thereon. The bailiff, by arrangement, sold the goods in plaintiff's shop from day to day, plaintiff assisting, a larger amount being thus realized than if sold by auction, and the balance over defendant's debt being paid plaintiff.

*Held*, affirming OSLER, J., that plaintiff, by the mortgage and his assent to the distress and sale, licensed the selling of the goods, though he was entitled to nominal damages for the sale of what was unnecessary; but that, as there was the right to distress for instalments in arrear only and not for interest thereon, plaintiff was entitled to judgment for the difference between the instalment and the amount distrained for. Per OSLER, J., the substitution of "instalments" for "interest" in

the Short Forms Act did not take it out of the statute.

*J. K. Kerr*, Q.C., for plaintiff.

*Muir*, contra.

#### HATELY ET AL. V. MERCHANTS' DESPATCH COMPANY ET AL.

*Carriers—Bill of lading—Conditions—Negligence—  
Judgment against three defendants—Separate  
appeals.*

Plaintiff consigned butter to his co-plaintiffs in England, shipping it by the defendant's company, under contract with defendant, Despatch Co.; on this bill of lading endorsed by plaintiff to his co-plaintiff in England, at a through rate, paid to defendants, Despatch Co., and apportioned by agreement amongst them. The butter was conveyed by the defendants, the G. W. R. Co., from London to New York, and there handed over sound on a vessel of the defendants, the G. Wes. Steamship Co., where it remained, through the latter's negligence, during some hot weather, causing damage, in which state it was when it reached the consignees. By the bill of lading it was provided that the consignees should see that they got their right marks and numbers, and that after the lighterman, wharfinger, or applicant for the goods had signed for the same the ship was to be discharged from all responsibility for misdelivery or non-delivery, and from all claims under the bill of lading. The learned judge (Osler, J.) who tried the case found for the plaintiff, giving a general verdict against all the defendants.

*Held*, per HAGARTY, C. J., affirming OSLER, J., that the condition on the bill of lading should, notwithstanding the general words at the end, be confined to cases arising from misdelivery or non-delivery, and did not relieve the Steamship Co. from liability for actual negligence.

Per CAMERON, J.—The stipulation in the bill, by its concluding general terms, discharged defendants from liabilities for the negligence complained of.

Per ARMOUR, J.—Where there is a general judgment against several defendants, rule 510 does not enable them to sever and appeal to several courts, but they must all appeal to the tribunal to which the defendant taking the first step has appealed.

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[Q.B. Div.]

**HERRING V. WILSON.***Distress for rent—Chattel mortgage—Seizure subject to.*

A. leased to B., who assigned to C., and sold to him the goods on the premises subject to a chattel mortgage to plaintiff and others upon the goods to secure to them the purchase money thereof. Defendant on 1st Feb. took possession of the premises under a parol agreement with C. that C. should assign the lease to him, and it was so assigned on 4th June following. There was no evidence of what arrangement existed between C. and defendant as to the goods, which, however, remained on the premises without defendant's request. Plaintiff and his mortgagees afterwards took possession of the goods under their chattel mortgage; but on the same day, before they were removed, the landlord seized for rent, but withdrew on plaintiff's promise to pay the rent. Plaintiff having broken faith as to payment of the rent, the landlord sued him and compelled payment; and plaintiff then sued defendant to recover the sum so paid.

*Held*, that there being no privity of contract or estate between defendant and plaintiff, and the goods not having been originally placed on the premises at the tenant's request, and having, in fact, when seized, been in possession of plaintiff, defendant was not bound to protect them against seizure for rent.

*Bethune*, Q.C., for plaintiff.

*Clute*, contra.

**SCOTT V. BENEDICT.***Vendor's lien.*

W. S., indebted to R. & Co., who held a saw mill and timber license, etc., belonging to the former, in their own name, as security, wrote them that he had arranged with his son, W. A. S., for the transfer to him of his business; and, upon his arranging with R. and Co. the liability of W. S., that W. A. S. was entitled to be placed in the position of W. S. with respect to the property held by R. & Co., and that on settling that liability they were to convey to W. A. S. By subsequent agreement W. S. agreed with W. A. S. that the latter was to pay off the liabilities of W. S. in two years, upon which W. S. was to transfer to him other lands than those held by R. & Co.

Subsequent advances were made by R. & Co. to W. A. S. The defendant, B., afterwards paid off R. & Co., and R. & Co. and W. A. S. joined in conveying to defendant B. the property in question. B. subsequently made advances to W. A. S. and his assignee on his becoming insolvent. To some of these plaintiff, the executor of W. S., agreed, under seal, stipulating that it should not affect their lien as against anyone but B. They then claimed a lien on the lands for the amount of the liabilities of their testator, W. S., which W. A. S. had agreed to pay as the consideration for the transfer to him of the business.

*Held*, affirming *GALT*, J. (*CAMERON*, J., dissenting), that no such lien existed, even if defendants had notice of the transaction between W. S. and W. A. S.

*McCarthy*, Q.C., for plaintiff.

*Bethune*, Q.C., and *Barwick*, contra.

**WILCOCKS V. HOWELL.***Libel—Privileged communications—New trial.*

The defendant and others signed a petition to the license commissioners of Hamilton that a license might not be granted to the plaintiff, stating his inn was one of the worst drinking holes in the country; that it was kept very disorderly, no suitable accommodation, and that the landlord was much addicted to drink.

*Held*, that the occasion of the presentation of the petition was privileged, but not absolutely so, and that it was for plaintiff to prove express malice.

*Robertson*, Q.C., for plaintiff.

*Osler*, Q.C., contra.

**REGINA V. DODDS.***Lottery Act, C. S. C. ch. 95.*

The defendant, being the proprietor of a newspaper, advertised in it that whoever should guess the number nearest to the number of beans which had been placed in a sealed glass jar in a window on a public street, should receive a \$20 gold piece, the person making the next nearest guess a set of harness, and the person making the third nearest guess, a \$5 gold piece; any persons desiring to compete to buy a copy of the newspaper and to write his name and the supposed num-

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ber of the beans on a coupon to be cut out of the paper. The defendant was convicted of a contravention of C. S. C. ch. 95.

*Held*, that as the approximation of the number depended as much upon the exercise of skill and judgment as upon chance, this was not a "mode of chance" for the disposing of property within the meaning of the Act.

PER HAGARTY, C. J.—The Act applies to the unlawful disposal of some existing real or personal property. In this case there were no specific gold coins, nor was there any particular set of harness, to be disposed of, which might have been forfeited pursuant to section 3 of the Act, and therefore the conviction was bad on that ground.

*Fenton*, for the Crown.

*Murdoch*, for the defendant.

Rose, J.]

[Dec. 31.

GRIGSBY V. TAYLOR.

*Penalty—Forfeiture—Action for—Election Act of Ontario, R. S. O. ch. 10.*

In an action under R. S. O. ch. 10, sec. 182, against an agent for the sale of crown lands to recover a penalty alleged to have been incurred by voting at an election of a member to the Legislative Assembly, contrary to sec. 4 of the Act.

*Held*, overruling a demurrer to the statement of claim, that, though forfeiture and penalties belong to the Crown unless otherwise disposed of, the sum declared to be forfeited by section 4 of the Act for a breach thereof, is a penalty within the meaning of sec. 182, sub-sec. 1, for which an action may be maintained by any person who will sue for the same.

*Tilk*, Q.C., for the demurrer.

*Arnoldi*, contra.

Hagarty, C.J.]

REGINA V. SMITH.

*By-law for weighing and measuring wood—Delivery in specified waggons—Ultra vires.*

The Municipal Council of the city of Hamilton passed a by-law that no person should, upon or after sale thereof, deliver any stove wood in or from any waggon, etc., otherwise than in or from a waggon, of a certain

capacity, the sides of which should be constructed of slats of a certain width and a certain distance apart from each other. The defendant was convicted of a breach of the by-law.

*Held*, that the by-law was *ultra vires*, for, though the Council had the right, under the Municipal Act, R. S. O. ch. 174, sec. 466, to provide for the weighing or measuring of wood, they had no power to enforce delivery, upon or after sale, in a particular kind of waggon.

*Clement*, for applicant.

*Mackelcan*, Q.C., contra.

## COMMON PLEAS DIVISION.

Rose, J.]

[Feb. 21.

COUGHLIN V. HOLLINGSWORTH.

*Claim—Counter claim—Balance in favour of defendant—Costs.*

An action on an unsettled account to which there was a counter claim, also on an unsettled account, was referred. The referee found that there was a sum of \$148.81 due the plaintiff on his claim, and \$164.50 due the defendant on his counter claim, leaving a balance due defendant of \$15.69; and he certified to entitle the defendant to full costs. It appeared that the statute of limitations was pleaded respectively to the claim and counter claim, and the items barred by the statute were in consequence disallowed; but that apart from the statute the balance would have been in plaintiff's favour. On motion to enter judgment the only question was as to the distribution of the costs.

*Held*, that the plaintiff was entitled to recover the costs of, and relating to his claim and proof thereof, including the reference and subsequent proceedings; and that the defendant was entitled to recover the sum of \$15.69, with the costs of, and relating to his counter claim and the proof thereof, including the reference and subsequent proceedings; the master to decide as to items in common, and that judgment be entered for the party in whose favour the balance shall be found.

*G. H. Watson*, for the plaintiff.

*French*, for the defendant.

Com. Pleas.]

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Rose, J.]

[Feb. 21.]

## COSGRAVE BREWING CO. V. STAIRS.

*Guarantee to firm—Death of partner—Notice determining guarantee.*

By an agreement under seal made between C. & Co., a firm of brewers, consisting of C. and his two sons of the first part, Q. of the second part, and defendant of the third part, defendant agreed to become responsible in a continuing guarantee of \$5,000 to C. & Co., or its members for the time being constituting the firm of C. & Co., for beer to be supplied to Q., so long as C. & Co. desire to sell and Q. to purchase same. On 6th September, 1881, C. died, Q.'s liability then being \$5,248. By C.'s will he appointed his said two sons his executors. They continued to carry on the business, and shortly afterwards entered into partnership under the same name, C. & Co. On 2nd October, 1882, the assets of the then firm were conveyed to one D., in trust for a joint stock company to be formed, and on its incorporation on 13th December following the assets were conveyed to the company, the present plaintiffs. Q. continued to be supplied with goods, and on 1st June, 1883, when the action was commenced, the indebtedness was over \$5,000, but that since C.'s death more than \$5,248—the then liability—had been paid by Q. In an action against defendant under the agreement to recover the \$5,000—the amount of his guarantee,

*Held*, by the death of C. a change in the firm was constituted, and the defendant was thereby released from any further liability under the agreement; and the evidence showed that the amount of indebtedness at C.'s death had been paid.

On 1st April, in consequence of Q. falling into irregular habits, defendant notified the then firm not to supply Q. with any more goods. The evidence showed that the firm was aware that Q.'s business was not in a satisfactory state.

*Seemle*, that this would put an end to defendant's liability, if not before put an end to.

*Osler, Q.C.*, and *Eddis*, for the plaintiffs.

*Aylesworth*, for the defendants.

## CHANCERY DIVISION.

## DIVISIONAL COURT.

[Feb. 21.]

## MCEWAN V. MILNE.

*Fraud—Onus of proof.*

The ordinary rule being that where there is "weakness on one side and extortion and advantage taken of that weakness on the other," the onus is upon the party likely to control the other to shew that the transaction was fair, just and reasonable, if it is impeached, and that, although the existence of confidence might be an ingredient in proving "influence" still "influence" is not to be presumed from the existence of confidence.

*Held*, that even if confidence had existed, which was not satisfactorily proved, it was not sufficient to throw the onus of proving that the sale and conveyance herein were not fraudulent or the effect of undue influence.

*R. Meredith*, for appeal.

*Cassels, Q.C.*, contra.

## SORENSEN V. SMART.

*Res Judicata.*

A. having supplied B. with goods, and being in the habit of advancing money on cheques or orders on C., for whom B. was doing contract work, brought his action in 1880 for the amount due him, and among other items gave credit for \$300 received on one of the orders. B. pleaded never indebted, *payment* and set off. At the trial B proved that in addition to the \$300 order he had given a \$475 order dated May 3, 1879, to A., and contended that both had been given as payment, while A. contended that he was only to give credit for what he received on the orders, and that he had received nothing on the latter. A verdict was entered and enforced in favour of A. for the amount he claimed.

B. now alleges that two days after the trial he discovered that A. had given another \$300 which he had not given credit for, but he did not move to set aside or reduce A.'s verdict and brings this action to recover the \$300 which he thus alleges A. has received twice, and sets up that he gave A. an order for \$300

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dated 15th January, 1879, and that \$300 were paid on this order on the 18th of March, 1879, and that he gave another order (no date mentioned) for the balance coming to him, and that \$300 were paid on this latter about April 10th, 1879, and that, as in the first suit only \$300 were credited, he now claimed \$300.

At the trial of the second action B. proved the giving of the first order in January, and swore that on the 18th March he endorsed a cheque or warrant for \$300 to A., but no such endorsed warrant, nor any receipt for same, is produced although D., another witness, swore that he paid it that day. B. also swore that he gave A. another order, the date of which he did not remember, and that A. had received \$300 on it on the 10th or 11th of April. D. also swore that the second payment was made on the second order, and a payment was proved by the production of an endorsed warrant or cheque that a \$300 payment had been then made. Defendant swore that he never received a payment on the 18th of March, and that the payment made 10th or 11th of April was made on the January order, and that he never received anything on the \$475 order.

*Held* (reversing the judgment of PROUDFOOT, J.), that A. was entitled to judgment on the defence of *res judicata*, the only issue in the first action necessary to be considered being that on the plea of payment, which, by the C. L. P. Act, sec. 113, is to be taken distributively.

*Held*, also, that such cases as *Sedden v. Tutop*, 6 T. R. 607, and *Chisholm v. Moore*, 11 C. P. 589 do not apply to such cases as this.

*Bethune*, Q.C., and *Jeffrey* for appeal.

*Hoyles*, contra.

#### SMITH V. SMITH.

*Married women—Will—Estoppel.*

L., a married woman, owner of certain land, at her death about 1830, assumed to devise it to her daughter P. and her husband O. for each of their lives, and thereafter to their children. T. went into possession of part of the land at the instance of O. about 1855. and built thereon and remained in undisturbed possession for over twenty-eight years. Those who claim in remainder under the will (the

life estates having expired), ask to have the land partitioned, and T. claims his part by length of possession.

*Held* (reversing the judgment of FERGUSON, J.), that although T. might be estopped from denying the title of L., still he was not estopped from denying that L. had transferred her title to those now claiming, and that as they claimed under the will of M. (a married woman) made in 1828 before there was power to devise, and so void on its face, they had no title, and T. must succeed.

*J. Hoskin*, Q.C., for infants.

*Ermatinger*, for defendant, T. J. Smith.

*McBeth*, for other adult defendants.

#### CORBETT V. HARPER.

*Reservation of timber—Construction of words.*

In a conveyance the grantor "reserves to himself all the standing timber upon the said lands, excepting that which measures eight inches through."

*Held* (reversing the judgment of PROUDFOOT, J.), that all the standing timber eight inches in diameter passed to the grantee, while all over that size was reserved by the grantor.

*Poussette*, for appellant.

*Hoyles*, for respondent.

#### BEATTY V. O'CONNOR.

*Mortgage.*

A mortgagee selling under the power of sale in his mortgage may sell on time without the mortgagor's consent, but he must treat the mortgage taken from the purchaser as cash. If a mortgagee, when selling, obtains the consent of the mortgagor to take a mortgage for part of the purchase money, he cannot cash such mortgage and charge the mortgagor with the expenses and discount without a distinct bargain to that effect.

*Held* (reversing the judgment of PROUDFOOT, J.) that the mortgagee herein had no right to sell the mortgage at the expense of the mortgagor, and that, as against a second mortgagee who did not consent to a sale on time, the mortgage must be treated on a cash basis.

*Held*, also, that this Court cannot interfere with the costs of the actions at law, of eject-

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ment and on covenant, which went to judgment there, and that the costs of exercising the power of sale under a statutory form of mortgage, are made a first charge upon the proceeds of sale R. S. O. p. 997, so that the mortgagee is entitled to them as a matter of contract.

*Held*, also, that G. O. 465, does not apply where there has been no proceeding in equity as to the costs which could give the Court jurisdiction to put the mortgagee to his election or warrant a disallowance of any of the bills.

*Lennox*, for plaintiff.

*G. W. Lount*, for defendant.

VAN EGMOND V. THE CORPORATION OF THE TOWN OF SEAFORTH.

*Municipal Act—Drainage—Arbitration—Right to maintain action.*

The defendants constructed a number of drains in their town, discharging into a creek running through the lands of the plaintiff, which drains conducted a quantity of brine or salt and refuse from salt manufactories in the neighbourhood into the creek and rendered the water filthy and unfit for drinking, and also corroded the machinery in plaintiff's woollen manufactory; and, having passed a by-law to deepen said creek, threw down plaintiff's fences, entered upon his land and threw up earth from the bed of the creek and left it there.

*Held* (sustaining the judgment of PROUDFOOT, J.), that the drains not being constructed under a by-law the plaintiff was entitled to maintain an action and was not compelled to seek his remedy for compensation by arbitration under the Municipal Act.

*Held*, also, that the damages for the trespass could be recovered by action, as the corporate powers under the by-law might have been exercised without the commission of the trespass.

*Blake, Q.C.*, and *Holmsted*, for appellant.

*Moss, Q.C.*, and *Garrow*, for respondents.

Boyd, C.]

[Feb. 20.]

RE L. U. C. TITUS, A SOLICITOR.

*Misconduct—Striking off the rolls.*

W., being about to be tried for a criminal offence, was impressed by T., her solicitor, that she was in great danger, and when consulting about her line of defence, was told by him that there were "other ways besides legitimate ways to manage these things." He subsequently sent her word that he wanted to see her, telling his messenger that he wanted some money "to salt the jury with." This message was delivered, and W., with another witness, called at his office and paid him \$100, when the use of it in that way was talked of in the presence of both. On a subsequent occasion, being sent for again, she paid him another \$100, because he said only three jurors had been fixed with the first \$100.

In the Master's office, on a taxation of T.'s bill, he gave no account of how the money was disbursed, except that he had paid it over to a third person to secure his assistance in the defence, and he was, or pretended to be, unable to say what amount he had received.

On this application to strike him off the rolls, T. denied generally any conversations in reference to jury bribing, and alleged that the money had been paid to a third party to secure his assistance in W.'s defence; but B., the messenger, swore that when he was first sent for W., T. had broached the subject of "salting the jury" to him, and on the second occasion had told him "that three jurors had been fixed all right." W. and the witness who accompanied her on both occasions to T.'s office, swore that on the first, the use of the money in that way with the jury was talked about, and on the second, that T. repeated to them what he had told the messenger—viz.: that only three of the jurors had been secured with the first \$100.

*Held*, that T.'s line of defence was not trustworthy, and that he had not vindicated himself, and an order was made striking him off the rolls.

*J. Hoskin Q.C.*, for petitioner.

*S. H. Blake, Q.C.*, contra.

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Proudfoot, J.]

[November 21.]

## CLARKE V. THE UNION FIRE INSURANCE COMPANY.

*Claim of the Agricultural Insurance Company—Administration of Insurance Company's deposit—Receiver's schedule—Subsequent claims—R. S. O. c. 160, secs. 21-22.*

This was a petition arising in connection with the administration of the deposits of the defendant's company in the hands of the Provincial Treasurer, under R. S. O. c. 160, secs. 21-22. The writ in the action in the administration was issued on November 29th, 1881, and an interim receiver appointed, who was continued in that capacity by judgment given on January 7th, 1882. The receiver prepared schedules in 1881, on which all policy holders were ranked. Afterwards, by agreement of January 21st, 1882, with the assent of all the policy holders, a re-insurance was effected with the Agricultural Insurance Company of the whole of the Union Company's risks other than one year risks. In consideration of such re-insurance the Agricultural Insurance Company took the note of the Union Company at three months from January 21st, 1882. This note was not paid, and the Agricultural Company now petitioned to be placed on the dividend sheet of the Union Company for the amount of the dividend already accrued, and for all future dividends.

*Held*, that they were entitled to the relief prayed, notwithstanding that in one sense their claim might be said to have arisen after the date of the receiver's schedule. But properly viewed the subject of their claim existed before the schedule though in a different shape. For, by the arrangement with them, made with the assent of persons entitled to rebate, the liability of the Union Company in respect to rebates was greatly reduced, and to that extent they should be taken to be subrogated to the position of the policy holders of the Union Company.

Proudfoot, J.]

[January 9.]

## DORLAND V. JONES.

*Land held in trust for religious body—Devolution thereof—Jurisdiction—R. S. O. 216, s. 10.*

This was an action brought by the trustees of the Westlake Monthly Meeting of Friends suing on behalf of all the members thereof; claiming a

declaration that they were entitled to certain lands in trust for the said monthly meeting, under a deed of 1821, whereby the said lands were granted in trust for the said meeting and their successors, and an injunction to restrain the defendants from interfering with them.

The defendants contended that the plaintiffs represented a faction which had seceded from the Westlake Monthly Meeting of Friends, and were not the Westlake Monthly Meeting of Friends, though they called themselves so; but that they themselves were the true and only Westlake Monthly Meeting of Friends, and the same body as the Westlake Monthly Meeting of Friends, as it existed at the time of the execution of the deed of 1821, inasmuch as they and not the plaintiffs were the members of the meeting who maintained the ancient and accepted doctrines and usages of the church called the Society of Friends.

Under an order for particulars the defendants specified the particulars of the doctrines, and articles of religious belief, usages, ordinances, and practices alleged to have been preached or taught by the plaintiffs, which are repugnant to those immemorially believed and observed by the Society of Friends.

*Held*, that, though it was no part of the duty of this or any civil Court to determine which of the conflicting views were true, yet, property being concerned, it was necessary to ascertain who were entitled to it, and for that purpose, but for that purpose only, to inquire into their religious opinions, according to the rule laid down by Lord Eldon in *Craigdallie v. Aikman*, 1 Dowl. 1.

It is not correct to say that in a case of a trust such as this, a majority could determine the devolution of the property. To determine the devolution of property, there must be some certain rule to go by, and assuming it possible that it might become the property of a body at variance in many particulars from the original, associated in the profession of new principles evolved by the inner light, it must be requisite that the whole body should change. So long as anyone remained attached to the original faith and order, that one is the beneficiary.

*Held*, upon the evidence, that the defendants' monthly meeting continued to be the same body in doctrine, order, and discipline as the Westlake Monthly Meeting was at the time the trust was created, and were entitled to a declaration that

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they, or some of them, hold the land in question in trust for the Westlake Monthly Meeting of Friends as represented by them, the defendants, and to an injunction restraining the plaintiffs from disturbing them in the use of the property.

*Semble*, R. S. O. c. 216, s. 10, as to the appointment of trustees of lands, by religious bodies does not require the mode of appointment to be determined at one meeting, and the appointment itself made at another. They may both be done at the one meeting.

*Y. Bethune, Q.C., and Clute*, for the plaintiffs.

*Y. MacLennan, Q.C., Arnoldi & Alcorn* for the defendants.

Full Court.]

[February 21.]

## KITCHING V. HICKS.

*Chattel mortgage—Registration—Book debts—R. S. O. c. 119.*

Appeal by the plaintiff to the Divisional Court from the judgment of Proudfoot, J., noted *supra* vol. 19, p. 276 (see also *supra* vol. 19, p. 59.)

Judgment of Court delivered by Osler, J.

Judgment of Proudfoot, J., varied so far as the book debts were concerned, and the plaintiff held entitled to judgment as to them.

Apart from the existence of actual fraud, the instrument is only avoided by the non-registration in so far as the Act required its registration, if that part of it can be severed from the rest, as here it certainly could. The assignment or charge of book debts is separable from the assignment of the goods, and as to it, registry was not necessary.

*Taylor v. Whittemore*, 10 U. C. R. 440 cited and approved of.

The rule now is, that if the legal part of the contract in question can be severed from that which is illegal, the former shall stand good whether the illegality exist by statute or common law.

The operative part of the instrument in question was as follows:—

"The party of the first part doth assign unto the party of the second part all his right and claim to the goods and stock in trade in the store of the said party of the first part to an amount sufficient to reimburse the said party of the second part whatever he may pay in consequence of becoming such surety as aforesaid, and should there not be stock enough for that purpose in the store at such time, the balance after deducting the value of the said

stock, shall be made up of the book debts then on the books of the party of the first part."

*Held*, that the terms of this agreement were not sufficiently comprehensive to cover the substituted, renewed or added stock in trade. Without adding words to the description, it could not be said that the stock secondly mentioned in the agreement was anything else than what might remain of that which had already been specifically assigned.

*Akers*, for the defendants, Clarkson, Huston & Co.

Ferguson, J.]

[February 21.]

## KIDDER V. SMART.

*Patent—Re-issue—Infringement—Laches.*

Action for infringement of a patent.

*Held*, that the delay (without any excuse whatever) of a patentee for a period of nearly two years, after full notice and knowledge of an inadvertence or mistake in his original patent, and after professional advice on the subject, and after a re-issue of the same patent in the United States, founded upon the same alleged inadvertence or mistake (during which period manufacture has been carried on in the United States under a re-issue there), before the application for a re-issue in this country, is fatal to the validity of the re-issue in Canada.

It is not wrong to manufacture and sell an article in this country which has been patented in the United States, and put upon it a statement that it is so patented, as a recommendation of it, so long as there is no infringement of a valid existing patent in this country.

*B. B. Osler, Q.C., and Wardell*, for the plaintiffs.

*C. Moss, Q.C.*, for the defendants.

## PRACTICE.

Masters' Office,

Mr. Hodgins, Q.C.]

[Jan. 8.]

## RE MUNSIE.

*Administration order—Preliminary issue—Jurisdiction of Master—Setting aside will—Personal Representative—Executor's liability for chattels given for life and then to remainder-man.*

The jurisdiction in Chambers to grant administration orders applies only to simple cases of account, and the Judge or Master in

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NOTES OF CANADIAN CASES.

[Prac.]

Chambers may take the administration accounts in Chambers without referring them to the Master's office. But to all such references Chancery order 220 applies.

When on application for such order it appears that there is a substantial and preliminary question to be decided, such question should be decided before the reference is ordered and the Court may limit a time within which the parties may try the issue. But if the issue is not tried, or the order is made in Chambers without first directing such issue, the parties are held to have waived such preliminary question and cannot raise it in taking the account under such order in the Master's office.

The Jurisdiction of the Master's office is not co-extensive with that of the Court in inquiring into, and adjudicating upon, the validity of documents, and there is no authority to support any implied or assumed delegation of the functions of the Court to the Master. Nor is there any practice in the Master's office which allows parties to obtain a reference to the Master, so as to evade the ordinary judicial functions of the Court and then invoke those judicial functions in a tribunal of delegated and subordinate jurisdiction.

The plaintiffs, when taking accounts before the Master under the ordinary Chamber order for the administration of personal estate, sought to have it declared that a bequest to R., who was one of the witnesses to the will, was invalid.

*Held*, 1. That the Master had no jurisdiction under such order, and on oral pleadings to adjudicate upon the validity of the will.

2. That even if there was such jurisdiction it could not be exercised in the absence of a personal representative of R.'s estate.

*Quære*, whether since *Ryan v. Devereux*, 26 U. C. R. 100, such a bequest would be held to be invalid.

Where a will creates a life estate in chattels, the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life, and not the executor, then becomes liable for them to the person entitled in remainder.

Boyd, C.]

MILES v. ROE.

[Feb. 4-

*Dominion election law—Penalties—Wilful delay.*

Election to the House of Commons in the County of Lennox, 1882. An action to recover penalties for bribery at an election under Statute of Canada, 37 Vict. ch. 9.

The acts of bribery complained of were committed between the 13th and 23rd of June, 1882. The writ was issued on the 12th June, 1883, and was served on the defendant on the 27th Nov., thereafter. The defendant, on the 30th Nov., moved to dismiss the action for wilful delay in prosecution under sec. 119 of the Act, but the Master in Chambers refused to make the order, and an appeal was taken to BOYD, C.

*Held*, that such delay as would not expose an ordinary suit to dismissal may be fatal to an action under this Act under the special provision that such an action shall be carried on "without wilful delay."

The *onus* rests on the plaintiff to account for and satisfactorily explain this delay.

The plaintiff's solicitor swore that he was also solicitor for the petitioner in the Lennox Election Petition, at which election the acts of bribery complained of are alleged to have been committed, and in order not to endanger the success of that petition it was deemed advisable not to serve this writ until that petition was disposed of, which on account of objections to the jurisdiction was not tried till 10th Oct., 1883. He also, in an affidavit, explained the further delay in this way, that at the trial of the election petition an application was made for a summons against the defendant under 39 Vict. c. 9, to have the penalties for bribery imposed upon him, and that the application was not disposed of till the 23rd Nov., at which date the Judge declined to interfere.

*Held*, that there had been wilful delay not to be excused by the explanations given, and that the plaintiff was entitled, as of right, to have the action perpetually stayed or dismissed.

The order was made dismissing the action without costs for the reason that a *prima facie* case of bribery was established on the part of the defendant which he did not attempt to contradict.

*Clement*, for the defendant (appellant).

*Bethune, Q.C.*, and *Aylesworth* for the plaintiff (respondent).

Prac.]

NOTES OF CANADIAN CASES—FLOTSAM AND JETSAM.

Boyd, C.]

## RE DUMBRILL.

[Feb. 4.]

*Lunacy petition—Husband and wife—Creditors—Costs.*

A petition was presented by the husband of D. to declare his wife a lunatic which was opposed by her. Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors. The Court dismissed the petition.

Upon application by D.'s solicitor for an order for payment of his costs between solicitor and client by the assignee in priority to creditors claims,

*Held*, that the costs are to be classed as necessities which the wife is liable to pay out of her separate estate and for which that estate is liable in the hands of her assignee.

The rule that provision should be made for maintenance out of the insolvent estate of a lunatic does not apply to these costs because the estate is not being administered in lunacy and because these costs cannot be put on the footing of maintenance. The costs should be paid ratably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment.

*Lefroy*, for the motion.

*Shepley*, contra.

## RYAN V. FISH ET AL.

*Striking out pleas in statement of defence—Reference as to damages without trial of issues on record—Jurisdiction of Master—O. J. A., secs. 47 and 48.*

In an action for damages for detention of dower, defendants pleaded: (1) that the lands in question were wild, and plaintiff not entitled to sum obtained for damages, if any; (2) that plaintiff had assigned her claim for damages; (3) set-off for money expended in respect of said lands; (4) that they did not detain, but were always willing, etc.

On a motion in Chambers, after issue joined, for an order directing a reference as to the damages, under sec. 47 O. J. A., and upon evidence, both for and against the truth of the pleas, the Master made an order striking out second and third pleas and directing a refer-

*Held*, that the Master had no jurisdiction to make the order, and that the issues raised questions that were properly triable only at the hearing.

*Lash*, Q.C., and *T. King*, for plaintiff.

*Hoyles* and *Macnee*, contra.

Cameron, J.]

[Feb. 14.]

## SMALL V. LYON.

*Costs—Scale of—Tender—Payment into Court.*

Appeal from the ruling of one of the taxing officers.

The defendant brought into Court with his defence a sum which he pleaded was sufficient to answer the plaintiff's claim, and the Judge at the trial, finding that it was sufficient, directed judgment to be entered for the defendant with costs. *Held* that the Judge at the trial had a discretion to deal with the question of costs, and, having exercised it, the taxing officer had no alternative but to tax to the defendant his full costs incurred, as well before as after the payment into Court.

Appeal dismissed with costs.

*Shepley* for the appeal.

*Aylesworth* Contra.

Rose, J.]

[Feb. 22.]

## LEACH V. WILLIAMSON.

*Interpleader issue—Attaching creditors.*

Upon appeal from the order of the Master in Chambers, directing an interpleader issue to be tried between the plaintiff and certain attaching creditors as to the validity of the plaintiff's judgment and execution,

*Held*, that the issue directed was warranted by sec. 10 of R. S. O. c. 54 (the Interpleader Act).

The order appealed from provided for the trial of the question of the validity of the plaintiff's judgment as against creditors generally, and also provided that on the trial of the issue it should be open to the attaching creditors to shew that the plaintiff's judgment was void as against the attaching creditors for fraud, or as being a preference.

*Held*, that these provisions were warranted by sec. 3 of R. S. O. c. 54.

Appeal dismissed with costs.

*Holman*, for the appeal.

*Aylesworth* and *Shepley*, contra.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

## HILARY TERM, 47 Vict., 1884.

During this term the following gentlemen were called to the bar, namely :—

Messrs. James Bicknell, gold medallist and with honours; George Walker Marsh; Donald Cliff Ross, John Young Cruikshank, Edward James Hearn, Wilmott Churchill Livingston, Robert Walter Witherspoon, George Frederick Cairns, Francis Stewart Wallbridge, Moses McFadden, Frederick Augustus Munson, Daniel Urquhart, Edward Guss Porter, James Burdett, Alexander Monro Grier, Edmund Campion, John James MacLaren. The last three being under Rules in special Cases.

And the following gentlemen were admitted into the Society as Students-at-Law, namely :—

Matriculants — John Frederick Gregory, William Edward Kelly, William Wesley Dingman, John Hind Hegler.

Junior Class — Michael H. Ludwig, Franklin Smoke, John B. McColl, Robert Wilson Gladstone Dalton, James Joseph McPhillips, Frederick Rohleder, Patrick Kernan Halpin, John Wesley Coe.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- 1884 and 1885. { Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.  
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem :—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek :

## FRENCH.

A paper on Grammar.

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnehoch, Lazare Hoche.

## or NATURAL PHILOSOPHY.

Books—Arnot's elements of Physics, and Somervilles Physical Geography.

## FIRST INTERMEDIATE.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

## FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

## FOR CALL.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts, Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O. ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## FEES.

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee.....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions.....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission.....	1 00
Fee for other Certificates.....	1 00

Copies of Rules can be obtained from Messrs. Rowsell & Hutchison.

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APRIL 1, 1884.

No. 7.

## DIARY FOR APRIL.

1. Tues.....County Court Sittings (except York).
3. Thur.....Prince Leopold born, 1853.
5. Sat.....Canada discovered, 1499.
6. Sun.....6th Sunday in Lent.
7. Mon.....Non-jury sittings of County Court (except York)—  
County Court Term and Surrogate Court Term.
11. Fri.....Good Friday.
12. Sat.....County Court Term ends.
13. Sun.....Easter Sunday.
14. Mon.....Easter Monday. Princess Beatrice born, 1857.

TORONTO, APRIL 1, 1884.

PLAYFULNESS in lawyers is much to be commended; it shows a buoyancy of disposition which speaks of innocence of heart, and is always calculated to create an agreeable impression. Hence we cannot doubt that the following passage in the appellant's factum in the *Dominion Telegraph Company v. Gilchrist* will be of much service to the cause of the appellant, and will be fully appreciated by the Judges of the Supreme Court:—

"The plaintiff in this case is known as a very clever man, not liable to be imposed upon or unfairly dealt with, but, if the portions of his evidence which he would have the Court believe are to be believed, he is the most credulous man in the universe; but this cannot be believed by anyone who is acquainted with him or his reputation. Anyone who believes that he is the credulous babe he pretends to be in evidence, believes an impossibility."

BUT if playfulness is commendable in lawyers, so also is it in legislatures, and a good joke once made should always be preserved. An excellent one is being kept on record in our statute books by the "Eternal General" as we once heard an intelligent small boy call Mr. Mowat. The following communication explains to what we are referring, but we fail to see why our correspondent should feel annoyed; on the contrary, we are grateful that such

a sense of humour exists among the members of the Government. We most of us learn to distrust the man of sour countenance, but those who appreciate innocent fun are generally men of integrity:—

"I see that in the Attorney-General's Married Woman's Property Bill, now before the Provincial Parliament, sec. 8, R. S. O. 125, is re-enacted verbatim. When I was a student 'grinding' for my Intermediates, I used to feel a perpetual annoyance with the closing simile in the section—that under certain circumstances a married woman shall have and enjoy all the earnings of her minor children in as full and ample a manner as 'if she continued sole and unmarried.' I still feel inclined to ask every-time I read the section: How many minor children is a woman, who continues sole and unmarried, supposed to have? Cannot Mr. Mowat substitute some other phrase which will not be open to the imputation of hinting at a very lax state of morals among the readers and compilers of the Revised Statutes?"

IN the recent case of *Reg. v. Price*, Mr. Justice STEPHENS held that the cremation of a corpse, provided it be performed decently and inoffensively, is not a criminal offence. In a case of *Williams v. Williams*, 20 Ch. D. 659; 46 L. T., N. S. 275, Mr. Justice KAY expressed a very strong opinion that a testator could not lawfully direct his executors to give his corpse to a third person for the purpose of being burned. In that case the plaintiff by fraudulent representations had got possession of the testator's corpse for the purpose of cremating it, pursuant to the express written directions given to her by testator before his death; and the learned judge held that, having wrongfully obtained possession of the corpse, the expense of the cremation could not be recovered from the testator's estate, notwithstanding that the testator expressly directed that the costs of the cremation should be borne by his estate.

## EQUITABLE EXECUTION.

## EQUITABLE EXECUTION.

IN the recent cases of *Fuggle v. Bland*, 11 Q.B.D. 711, and *Westhead v. Riley*, 49 L.T., N.S. 776, the English Courts appear to be finding a way of giving relief to creditors in cases in which according to the cases of *Horsley v. Cox*, 4 L.R. Chy. 92 (followed in this Province in *Gilbert v. Jarvis*, 16 Gr. 265, *St. Michael's College v. Merrick*, 1 App. R. 520; and *Fisken v. Brooke*, 4 App. R. 8), a creditor has hitherto appeared to be without remedy.

In *Fuggle v. Bland*, judgment had been recovered against a husband and wife; the latter was entitled to a reversionary interest under her father's will, and the plaintiff applied for the appointment of a receiver of this interest and the Court (LOPES and POLLOCK, JJ.) appointed the plaintiff himself receiver, without requiring security. In *Westhead v. Riley*, the defendant, against whom judgment had been recovered, was a solicitor, and, as such, was entitled to recover certain costs out of a fund standing in the Palatine Court of Lancaster, under an order made in that Court in an administration action, in which the defendant had acted as solicitor. After the costs had been taxed, the plaintiff, Westhead, obtained *ex parte* an injunction restraining the defendant from receiving the costs, and he subsequently moved on notice to the defendant for the appointment of a receiver of the costs, which was granted by CHITTY, J., on the authority of *Fuggle v. Bland*.

In *Gilbert v. Jarvis*, the plaintiff was a judgment creditor of the defendant, who, he alleged, was entitled to a large sum from the estate of her deceased husband as executrix and devisee, and the plaintiff claimed to have her husband's estate administered, so far as necessary for the purpose of having the amount of the indebtedness to the defend-

ant ascertained, and made available for the payment of his claim.

This relief the Court of Appeal held (following *Horsley v. Cox*) could not be given; but it appears difficult to distinguish the facts of that case from those of *Fuggle v. Bland*, and according to the latter case under such circumstances as existed in *Gilbert v. Jarvis*, the Court would now appoint a receiver. The claims in respect of which the receiver was appointed, in both *Fuggle v. Bland* and *Westhead v. Riley*, were not claims which could be attached under the garnishee clauses of the Common Law Procedure Act, see *Webb v. Stenton*, 11 Q.B.D. 518; *Vyse v. Vyse*, 76 L.T. 315; *Dolphin v. Layton*, 4 C.P.D. 130; *Stevens v. Philips*, 10 L.R. Chy. 417. The non-attachability of a claim would therefore seem to be no longer a bar to its being reached by way of equitable execution.

## REPORTS.

## ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

## PRACTICE.

## SHEPPARD V. KENNEDY.

*Lis pendens*—Vacating same—Endorsement on writ.

A *lis pendens* should not be vacated unless it appears from the endorsement on the writ or the pleadings that the claim upon the land is not an appropriate remedy. There should be clear and almost demonstrative proof that the writ is an abuse of the process of the Court.

*Jamieson v. Lang*, 7 P. R. 404, approved of.

When a plaintiff seeks to register a *lis pendens* he should be more precise in respect to the endorsement on his writ than in ordinary cases, and should define generally the grounds of his claiming an interest in the lands.

[March 5.—Boyd, C.]

This was an application to vacate a *lis pendens* under the following circumstances:

On Feb. 9th, 1884, the plaintiff issued a writ in the Chancery Division against M. Kennedy and T. J. Stewart, and endorsed it as follows: "The plaintiff's claim is to have a deed made between the defendant, M. Kennedy, and the defendant, T. J. Stewart, set aside and cancelled, of lots 4

[Prac.]

SHEPPARD V. KENNEDY.

[Prac.]

and 5 in the 2nd range south of the Durham Road in the township of Kinloss, in the County of Bruce, and to restrain the defendants from disposing or encumbering the same."

The defendant, Kennedy, showed by affidavit that there had been no sale of the said lands from him to Stewart; that a deed had indeed been drawn up and signed by him, and handed to Stewart, but with the understanding that Stewart should satisfy himself as to the title, and as to incumbrances, and the sale should only be carried out if these enquiries proved satisfactory; that, on enquiry, Stewart found four writs of execution against the lands of Kennedy in the Sheriff's hands, and thereupon sent back the deed, which had been cancelled, and refused to go on with the sale; that Kennedy had then taken steps to have these writs of execution set aside, and had succeeded in the case of three of them; that the fourth was the execution of the plaintiff in a County Court case against Stewart, and Kennedy had made a similar application to set this aside, which was pending, the Judge having heard the application, but reserved judgment.

In answer, the plaintiff produced the affidavit on which Kennedy was moving to set aside his execution, in which Kennedy admitted the debt due on the promissory note, on which the plaintiff was suing in the County Court; and also shewed that Kennedy had no other means wherewith to pay his claim, which would be endangered by vacating the *lis pendens*; and that the consideration in the deed from Kennedy to Stewart was \$2,400, whereas the land was worth \$3,000 or \$4,000; and that Kennedy was apparently trying to realize on his property, and would return with the proceeds to Dakota, where he had been residing for two or three years past.

The motion was made before Mr. Dalton, Master in Chambers, on Feb. 27th, 1884, who, on March 3rd, 1884, gave judgment as follows: "It is not useful for me to consider this case particularly, for *Jamieson v. Laing*, 7 P. R. 404, must prevent me probably from granting what is asked. I, therefore, take the course suggested in that case of referring to a Judge, that the relief also there suggested may be given to the defendant if he be entitled."

On the same day the matter was again argued before Boyd, C.

H. J. Scott, Q. C., for the motion.—The plaintiff has no right to tie up the defendant's land in the manner he is attempting to do. It is an abuse of the practice of the Court. *Jamieson v. Laing*, 7 P. R. 404 is of doubtful authority. If the plaintiff's execution proves good there is no need of the

*lis pendens*, at all events the plaintiff should be sent to a speedy hearing.

A. H. F. Lefroy, contra.—*Jamieson v. Laing* is an authority in our favour, but our case is a stronger one than that, for (1) we are at present, at all events, judgment creditors, with executions in the Sheriff's hands; (2) the defendant, Kennedy, admits our debt, and, therefore, on the principle that he who seeks equity should do equity, the *lis pendens* should not be vacated unless he pays into Court what he admits is owing. Moreover, admitting the debt as he does, this can scarcely be called an illusory and fictitious suit.

Boyd, C.—By the endorsement on his writ the plaintiff's claim is to "have a deed made between the defendant, Kennedy, and the defendant, Stewart set aside and cancelled, of lots 4 and 5 (giving description), and to restrain the defendants from disposing or encumbering same." It is further stated by endorsement that plaintiff sues on behalf of himself and of all other creditors of the defendant, Kennedy.

By virtue of this writ the plaintiff has registered a certificate of *lis pendens*, which the defendant now moves to vacate. There is no complaint of the insufficiency of the endorsement of claim, and it is not asked that the action should be dismissed, or the writ taken off the files as an abuse of the power of the Court. The motion is to vacate the registration of the *lis pendens*, on the ground that the action is illusory. Of this I am not so clearly satisfied that I will deprive the plaintiff of the chance of litigating as to the meaning of the transaction between the defendants. It may well be that nothing more happened than is detailed in their affidavits, but no suitor is obliged to submit to a preliminary trial of his case on affidavit. If the plaintiff chooses to go on to attack both defendants on the footing of there being a deed of the property from one to the other, which was intended to defeat and defraud creditors, he should not have his right to a trial intercepted in a summary way. I cannot, upon the materials before me, conclude the plaintiff by saying that his action is fictitious and illusory. He may be beaten at the trial, but my very strong impression is that he has the right to prosecute the litigation to that point, if he is so advised.

The endorsement on the claim may be developed into a statement of claim, which will show a valid cause of action against both defendants. At present no cause of action is clearly stated in the endorsement. It may be sufficient under R. 11, but my own view is that where the plaintiff seeks to register a *lis pendens* he should be more precise than

Prac.]

NORDHEIMER V. MCKILLOP—NOTES OF CANADIAN CASES.

[Sup. Ct.]

in ordinary cases, and by his endorsement he should define generally the grounds of his claiming an interest in the land. The right to register a *lis pendens* arises from the statute R. S. O. cap. 40, sec. 90, as it merely places on record the historical fact that litigation is pending, touching a particular property. While this litigation is pending, I see great difficulty in making any such order as is asked here to vacate the registration of the *lis pendens*, except in that class of cases when it appears from the endorsement or pleading that the claim upon the land is not an appropriate remedy. Thus, if a wife sued for alimony, and alleged that unless her husband was enjoined from selling his land he would dispose of it to her prejudice, and upon this statement registered a *lis pendens*, the judge might and would declare that the certificate had improperly issued, and the registration of that order would operate to clear the registry.

But here there may be a cause of action affecting the land and the motion is not to set aside the writ as a vexatious thing, but merely to vacate the registration. As at present advised, I cannot clearly say that the action is illusory and fictitious, even if a direct attack was made upon the writ, and that being so, I should not now interfere. *Jacobs v. Raven*, 30 L. T. N. S. 266. I had occasion to consider the cases in which such an action as the present could be sustained in *Campbell v. Campbell* 29 Gr. 252.

But this is a case in which the trial of the action should be expedited. The plaintiff should serve his statement of claim forthwith and go down to trial at the next sittings of the Court at Goderich.

I approve generally of the practice laid down in *Jamieson v. Laing*, 7 P. R. 404, where the motion is to take the writ off the files as an abuse of the process of the Court. There should be a clear and almost demonstrative proof that it is so before the plaintiff's right to hear his case tried is interfered with.

But where the motion is to vacate the registration of the *lis pendens* because the remedy against the land is not appropriate to the cause of action which is pending, then I see no reason why the Master may not finally dispose of the matter without referring it to a judge. I reserve the costs of the present application to be dealt with subsequently."

#### NORDHEIMER V. MCKILLOP.

*Commission to take evidence—Credibility of witness—Rule 285.*

A commission to examine as a witness a person who has absconded from the Province, will not be refused on the ground that he is alleged not to be a credible witness and that his cross examination in open Court is desired.

This was an action of replevin. One G. was tenant of the defendant; he had purchased, on the hire-receipt principle, from the plaintiff, a piano which was put into his hotel at B. Before the plaintiff would allow the piano to be put into the hotel they required G. to obtain from the landlord a waiver of all distress for rent as against said piano. This waiver he signed himself under and in pursuance of a power of attorney. G. absconded to the States and defendants destroyed the piano for rent alleged to be due. Plaintiff replevied upon the strength of the waiver. The plaintiff now applied for a commission to examine G. to prove that he signed the waiver under power of attorney, and also to prove that no rent was due at date of seizure. Defendant resisted the application on the grounds that G. was not a credible witness, that he could not be believed upon his oath, and that they desired him to be present in Court that he might be subjected to a rigid cross-examination and show his demeanour to the jury.

*McPhillips*, for motion. The credibility of G. cannot be tried on affidavits in Chambers, but was a question for the jury at the trial. A good case for the commission has been made out.

*Clement*, for defendant, relied upon *Crofton v. Crofton*, L. R. 20 Chan. Div. 674, and cases there cited.

On March 4th the Master in Chambers made the order. The defendant appealed.

*Clement*, for appeal.

*McPhillips*, contra.

March 10th, GALT, J., affirmed the order of the Master in Chambers, and dismissed the appeal with costs to the plaintiff.

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PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

#### SUPREME COURT.

Ontario.]

ROSENBERGER ET AL. V. GRAND TRUNK RAILWAY COMPANY.

*Railways—Failure to sound whistle, etc.—Accident through horse taking fright—Con. Stat. Can. chap. 66, sec. 104—Findings—Evidence.*

*Held* (affirming the judgment of the Court of Appeal for Ontario and of the Court of Common Pleas), that Con. Stat. Can. chap. 66, sec.

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104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage either in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle as they are directed to do by said statute, whether such damage arises from actual collision or, as in the case here, by a horse being brought near the crossing and taking fright at the appearance or noise of the train.

The jury in answer to the question, "If the plaintiff had known that the train was coming would they have stopped their horse further from the railway than they did?" said "yes."

*Held*, that though this was not very definite, yet taken with the evidence on which the jury acted, and as the question was not objected to by counsel at the time it was put by the judge, it was sufficient.

Appeal dismissed with costs.

*Bethune, Q.C.*, for appellants.

*Bordly*, for respondents.

Ontario.]

#### BOTHWELL ELECTION PETITION.

##### HAWKINS v. SMITH.

*Ballot—Scrutiny—Irregularities by Deputy Returning Officers—Numbering and initialing ballot papers—Effect of—The Dominion Elections Act, 1874, sec. 80.*

In a polling division there was no statement of votes either signed or unsigned in the ballot box, and the deputy returning officer had endorsed on each ballot paper the number of the voter on the voters' list. These votes were not included either in the count before the returning officer, the re-summing up of the votes by the learned Judge of the County Court, nor in the recount before the judge who tried the election petition.

*Held* (affirming the decision of the Court below), that these ballots were properly rejected. Certain ballot papers were objected to as having been imperfectly marked with a cross, or with more than one cross, or with an inverted V, or because the cross was not directly opposite the name of the candidate, there being only two names on the ballot paper, and a line dividing the paper in the middle.

*Held* (affirming the rulings of the learned Judge at the trial), that these ballots were valid.

Per *RITCHIE, C.J.*—Whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, it should be counted, unless, from the peculiarity of the mark made, it can be reasonably inferred that there was not an honest design simply to make a cross, but that there was also an intention so to mark the paper that it could be identified, in which case the ballot should be rejected. But if the mark made indicates no design of complying with the law, but on the contrary, a clear intent not to mark with a cross as the law directs, as for instance by making a straight line or a circle, then such non-compliance with the law renders the ballot null.

Division I., *Sombra*.—During the progress of the voting, at the request of one of the agents, who thought the ballot papers were not being properly marked, the deputy returning officer initialed and numbered about twelve of the ballot papers, but finding he was wrong at the close of the poll, he, in good faith and with an anxious desire to do his duty, and in such a way as not to allow any person to see the front of the ballot paper, and with the assent of the agents of both parties, took the ballots out of the box and obliterated the marks he had put upon them.

*Held* (*GWYNNE, J.*, dissenting), that the irregularities complained of not having infringed upon the secrecy of the ballot, and the ballots being unquestionably those given by the deputy returning officer to the voters, they should be held good, and that said irregularities came within the provisions of sec. 80 of the *Dominion Elections Act, 1874*; *Jenkins v. Brecken, Queen's County Election*, 7 Can. S.C.R., 247, followed.

Per *HENRY, J.*—On the trial of an election petition ballots numbered by the deputy returning officer, as in the present case, should be held bad; but it did not lie in the mouth of the present appellant, who had acted upon the return of the returning officer and taken his seat, to claim that the proceedings were irregular and say that the election was void.

*Hector Cameron, Q.C.*, for the appellant.

*Lash, Q.C.*, for the respondents.

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New Brunswick.]

VENNING, *appellant*, v. STEADMAN,VENNING, *appellant*, v. HARRISON,VENNING, *appellant*, v. SPURR, *respondents*.

*Trespass*—31 *Vict. ch. 60, secs. 2, 19*—*Order in Council, 11 June, 1879*—*Construction of*—*Fishery officer*—*Action against*—*Notice*—*Damages*.

Appeal from the Supreme Court of New Brunswick.

Three several actions for trespass and assault were brought by A., B. and C., respectively, riparian proprietors of land fronting on rivers above the ebb and flow of the tide, for forcibly seizing and taking away their fishing rods and lines, while they were engaged in fly fishing for salmon in front of their respective lots. The defendant was a fishery officer, appointed under the Fisheries Act (31 *Vict. ch. 60*), and justified the seizure on the ground that the plaintiffs were fishing without licenses in violation of an Order in Council of June 11th, 1879, passed in virtue of sec. 19, ch. 60, 31 *Vict.*, and which order was in these words:—"Fishing for salmon in the Dominion of Canada, except under the authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited." The defendant was armed, and was in company with several others—a sufficient number to enforce the seizure if resistance was made—and there was no actual injury. A. (who was a County Court Judge) recovered \$3,000, afterwards reduced to \$1,500, damages; B. \$1,200, and C. \$1,000.

*Held, 1.* That secs. 2 and 19 of the Fisheries Act, and the Order in Council of the 11th June, 1879, did not authorize V., in his capacity of Inspector of Fisheries to interfere with A., B. and C.'s exclusive right as riparian proprietors of fishing at the *locus in quo*.

2. (GWYNNE, J., dissenting.) That when V. committed the trespasses complained of he was acting as a Dominion officer under the instructions of the Department of Marine and Fisheries and not as a Justice of the Peace, and was not entitled to notice under Cons. Stat. N.B. ch. 89, sec. 1, or ch. 90, sec. 8.

3. That the damages were excessive, and on that ground a new trial should be granted.

Appeal from a judgment of the Supreme Court of New Brunswick on a motion for a non-suit or new trial.

The facts and pleadings are stated in the report of these cases in 22 N. B. Rep. p. 639 (1) (see also *Phair v. Venning*, 22 N. B. Rep. 362).

*Harrison and Burbridge*, for appellant.  
*Wetmore*, Q.C., for respondent.

## QUEEN'S BENCH DIVISION.

IN BANCO.

MUREAU v. BOLTON.

*Grant to life tenant*—*Remainder-man in fee*—*Partition and sale of life estate*—*Prohibition*.

The interest of a tenant for life is not within the Partition Act, and a prohibition on his application was granted to prevent sale.

ARMOUR, J., dissenting.  
*McMichael*, Q.C., for plaintiffs.  
*Clement*, contra.

LOCKIE v. TENNANT.

*Third party.*

A third party can only be joined before trial, and an original defendant, if he desires to secure indemnity against a third party, must sue independently.

*Osler*, Q.C., for plaintiff.  
*T. G. Blackstock*, for third party.  
*Robinson*, Q.C., and *J. H. Macdonald*, for defendants.

WALTON v. APJOHN.

*Ontario Election Act*—*Algoma election*—*Refusal of votes*.

The duties of a deputy returning officer are not judicial, but ministerial only, unless personification, etc., is attempted, and if he refuses the votes of any entitled to vote he is amenable to consequences under the Election Act. In this case the vote of a party was refused because he could not specify his land with precision, though he alleged it to be in one of several localities mentioned by him: the deputy returning officer was held liable. HAGARTY, C.J., *dubitante*.

No notice of action necessary in such a case.

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A foreign commission opened between the parties before trial cannot be objected to at trial because of any defect in the manner of execution.

*Oster, Q.C., and Meek, for plaintiff.*  
*MacLennan, Q.C., and Proctor, contra.*

#### GILES V. MORROW.

*Dower—Report of Commissioners—Time for moving against.*

A motion within first four days of Michaelmas Sittings against the report in action of dower filed 29th May previously, *held*, too late.

*McPhillips, for motion.*  
*T. G. Blackstock, contra.*

#### RICE V. GUNN.

*Principal and agent—Gambling contract—"Options"—"Differences"—Onus of proof—Proof of foreign law.*

Defendants, Toronto merchants, engaged plaintiffs, Chicago brokers, to buy and sell grain in Chicago on margin, which the latter did, advancing them money, for which they sued, defendants having refused to settle for losses sustained.

*Held*, reversing the judgment of PATTERSON, J.A., that, assuming the State law to be that if the contract was to deal in such a way that only the differences in prices should be settled according to the rise and fall of the market, and no grain be either delivered or accepted, the contract would be a gambling contract and illegal; it lay upon defendants to establish clearly that such was the character of the dealing; and this defence not having been clearly proved, judgment was given for the plaintiffs.

After judgment at the trial, but before the argument *in banc*, the defendants put in a report of a case, bearing upon the question, decided in the Supreme Court of the U. S., verified by affidavit; *held*, admissible.

Where the opinions of experts on foreign law are conflicting, the Court will examine for itself the decisions and text-books of the foreign country, in order to arrive at a satisfactory conclusion.

#### KERR V. CANADIAN BANK OF COMMERCE.

*Assignment for creditors—Validity of—Trusts to pay partnership debts only—Power to pay off liens in full—Change of possession.*

W. and W. made an assignment of all their assets, both separate and partnership property, to the plaintiff in trust to realize and pay "all the just debts of the said creditors of the said debtors rateably and proportionably, and without preference or priority." There was a proviso that the trustee might pay any creditor in full whose debt constituted a lien on any part of the assets, whenever he deemed it advisable so to do. It appeared that one of the partner's had no property, and owed but \$110; that the other had some household furniture which was seized for rent, which it satisfied; that he owed less than \$100 otherwise; and that all these separate debts had been satisfied.

*Held*, CAMERON, J., dissenting, that the assignment was not void in providing for payment of partnership creditors only.

*Held*, also, that the provision that the trustee might pay off any lien or charge on the assets, did not invalidate the assignment.

*Held*, also, that there was, under the facts stated, an actual and continued change of possession.

*Moss, Q.C., and Lees, for motion.*  
*J. K. Kerr, Q.C., contra.*

Rose, J.]

[Feb. 26.]

#### IN RE HARDING AND WREN.

*Arbitration—Costs.*

When the submission or order of reference is silent as to costs, arbitrators have no power to adjudicate upon them, but each party must bear his own costs and half those of the award.

A direction as to the costs in such a case held severable from the rest of the award.

*Holman, for motion.*  
*Smith (St. Mary's), contra.*

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[Feb. 26.]

#### REGINA V. BERNARD.

*Conviction—Prior conviction—Refusal to receive evidence of—Costs.*

A warrant was issued by a magistrate for the apprehension of the defendant, who was

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brought before another magistrate thereon, convicted and fined. Subsequently the magistrate who had issued the warrant, caused the defendant to be summoned before him for the same offence, and again convicted and fined him, after refusing to receive evidence of the prior conviction.

The Court quashed the second conviction with costs.

*Held*, that, even assuming that the first conviction was void by reason of the defendant having been brought before a magistrate other than the one who issued the warrant, his appearance and pleading thereto amounted to a waiver, and, at any rate, the magistrate who convicted the second time could not take advantage thereof.

*Watson*, for motion.

*Alan Cassels*, *contra*.

Cameron, J.]

RE DOVER AND CHATHAM.

*Drainage—Award—Surveyors' Report.*

Under the Municipal Act the surveyor's report and plans with a view to drainage, in which a couple of townships are interested, should shew the work towards which the servient one is to contribute; and a report which does not comply with secs. 529 *et seq.* of that Act renders void the award confirming the surveyor's assessment.

COMMON PLEAS DIVISION.

HARRISON V. LEACH.

*Local Judge of High Court—Order for speedy judgment—Varying same.*

On 19th January, plaintiff obtained an order for speedy judgment from one of the county judges, Middlesex, as local Judge of the High Court, under which judgment was signed and execution placed in the sheriff's hands. It was the practice of both the local courts judges in the county to insert a provision that all creditors whose writs of summons had issued prior to that of the creditor applying for the order should be allowed to come in and share rateably with such creditor, provided they obtained judgment within a limited time. The plaintiff's solicitors were not aware

of such practice, and in good faith obtained the order without such provision; nor did the learned judge suggest its insertion. Another creditor, whose writ was issued prior to plaintiff's, applied to the local judge, who granted a summons bringing plaintiff before him, and on the return thereof, on 24th January, under an order amending the order previously made by him, by requiring the provision as to rateable distribution to be inserted therein, and directing the sheriff to be governed thereby. The plaintiff thereupon appealed to CAMERON, J., who held that the learned judge had no power to make the order of 24th January, which was thereupon set aside on appeal to the Divisional Court.

*Held*, that the appeal must be dismissed; that the local judge has no power to vary the order granted by him without concealment or fraud, and after it had been acted upon.

*G. M. Rae*, for the plaintiff.

*R. M. Meredith*, for the applicant.

MURPHY V. DALTON.

*Clearing land—Setting out fire—Sudden rising of wind—Negligence—Watching fire.*

The defendant, for the purpose of clearing his land, set out fire on same. There was a thin, bare lot taken out of the south-east corner of the defendant's lot, on which there was a mill, and near the mill a quantity of lumber belonging to the plaintiff. The defendant set out the fire on Monday, but before doing so consulted with the plaintiff, who agreed that the weather was favourable for the purpose, the wind blowing in the direction away from the plaintiff's property. In setting out the fire he burnt up around the plaintiff's property so as to prevent the fire from spreading to it in case of change of wind. The wind continued in the same direction on Tuesday and Wednesday, and in the interval there were falls of rain, in consequence of which the defendant did not keep a watch over the fire. On Thursday morning there were indications of a change of wind and the defendant sent his son to go and watch the fire, but when he arrived the wind was blowing at the rate of from thirty-five to forty miles an hour, and by reason of this sudden rising of the wind the fire was communicated to the plaintiff's lumber, which was destroyed. The evidence

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shewed that, even if plaintiff had been watching the fire he could not have prevented its spreading.

*Held*, under the circumstances, the defendant was not liable for the damage sustained by the plaintiff.

*Osler*, Q.C., for the plaintiff.

*Falconbridge*, for the defendant.

### NOTT V. NOTT.

#### *Arbitration—Award—How to be executed.*

The three arbitrators to a reference on the close of the evidence agreed on their finding, and a minute thereof was made in writing by one of them, but not signed; and it was understood that nothing further was to be done but have a formal award drawn up and executed. Next day the award was drawn up and executed by two of the arbitrators, in the presence of each other, but in the absence of the third arbitrator, who a couple of days afterwards executed it in the presence of one of the other arbitrators.

*Held*, that the award should have been executed by the three arbitrators together, and not having been so executed is invalid.

*Marsh*, for the plaintiff.

*C. Ritchie*, for the defendants.

### WELTON V. NORTHERN RAILWAY CO.

#### *Railways—Accident—Negligence—Contributory negligence—Automatic bell.*

The defendants' track crossed the highway at an acute angle and was some seven feet above the highway, which was graded up to it, and the view was obstructed by some bushes. The plaintiff, early in the morning, it not being quite daybreak, was sitting on a bob-sleigh driving a yoke of oxen along the road, when, just as he came on the track, he saw a train approaching, when he jumped to the off side on to the track and hit the off ox to spring aside and clear the track, but before plaintiff could get clear himself, he was struck by the train and injured. It was objected that if the plaintiff had jumped on the nigh side he would have escaped injury, and that by his act he voluntarily placed himself in a position of danger. The plaintiff, however, said that the way he acted was the quickest way of getting out of the danger. On the part of the plaintiff,

it was shown that neither the bell was rung nor the whistle sounded; while defendants proved that the bell was an automatic bell and being rung by the action of the wheels; that it was ringing when the engine left the last station. One of plaintiff's witnesses stated that these bells get out of order. The jury found that the whistle was not sounded or the bell rung—that it was not in good order; and that the plaintiff, under the circumstances, exercised reasonable care.

*Held*, that it could not be said that the findings were not justified by the evidence, and the Court, therefore, refused to interfere.

*Cressor*, Q.C., for the plaintiffs.

*Osler*, Q.C., for the defendants.

### MAUGHAN V. CASIE.

#### *Trespass—Highway—Registry Act—Right of way—Surveyors' Act—Short Forms Act—Contemporaneous conveyances—Pleading—Unity of title.*

The trustees under C.'s will executed contemporaneous conveyances under the Short Forms Act of a farm divided into six parcels to the six surviving children, according to a registered plan. The farm had theretofore been held by unity of title. The description of parcel 2 included a lane described in the plan as a right of way, the use of which was reserved in the deed for the owners of parcels 4 and 6, which adjoined it, and to whom it was a way of necessity. Parcel 3, which adjoined the way (but to which it was not a way of necessity) was conveyed without any mention of the lane.

*Held*, that the grantee of parcel 3 could not claim a right of way over the lane, parcel 2 being expressly subjected to a right of way in favour of parcels 4 and 6. That the owner of parcel 3 could not burden parcel 2 with any other servitude than that granted to the owners of parcels 4 and 6. *Held*, also, that R. S. O. c. 102, does not apply, because of the exception expressly made in the deed in favour of parcels 4 and 6. That there was not a continuous easement; that the way was not a public highway; that the plaintiff's right had not been barred by the Statute of Limitations; that the ownership by defendant of a part of parcel 4 did not justify the trespass complained of. The pleadings remarked upon.

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*Bethune, Q.C., and J. E. Robertson, for the plaintiff.*

*S. Blake, Q.C., and Delamere for the defendant.*

IN RE H. L. LEE.

*Extradition—Forgery—Information—Pleading—Depositions—Authentication of—Copy of account book—Admissibility of—Corroborative evidence.*

The information charged that the informant hath just cause to suspect and believe that the prisoner "is accused" of the crime of forgery, but the information went on to charge that the prisoner did feloniously forge, etc.

*Held*, sufficient, the expression objected to being surplusage; and also that the objection was not tenable under the Criminal Act of 1869, the offence being perfectly understood by the Court and prisoner.

*Held*, also, that in a proceeding of this kind a plea to the information is not essential.

An objection was taken to the sufficiency of the declaration made by the Governor of the Foreign State under his official seal.

*Held*, sufficient.

The authorities of a bank having refused to allow one of their books to be brought to Canada. *Held*, that secondary evidence was admissible.

Objection was also taken to the sufficiency of the corroborative evidence given in the case; but it was *held* sufficient.

*Murphy, for prisoner.*

*Fenton, Crown Attorney, for Crown.*

MACDONALD V. MURRAY.

*Agreement—Sale of land—Certified copy—Secondary evidence—Admissions at former trial—Registered document—Fraud—Short-hand evidence in—Non-suit—Reply—Interrupting Judge's charge.*

The plaintiff sold defendant two lots on Main Street, Winnipeg, under an agreement signed by all the parties. The agreement was duly registered. The Registrar, who was examined under a commissioner, refused to produce the original but put in a copy duly certified by himself. Its admission was objected to because the commissioner had not certified to it. The defendants had admitted

the agreement at a former trial but objected to it at the subsequent one. Defendants objected that as the land was in Manitoba and out of the jurisdiction, the Court could not give complete relief to the defendants. The evidence of one of the witnesses was objected to because of its being taken in short-hand before a special examiner and an office copy put in. Evidence offered in reply to defendant's evidence of fraud was objected to on the ground that he had already given evidence to disprove it. The learned Judge, before whom the case was tried, decided to non-suit plaintiff because the agreement had not been properly proved, but allowed the case to go to the jury on the question of fraud. Defendant's counsel claimed that the decision to non-suit, placing the burden of proof on him, gave him the right to reply. Defendant contended that the plaintiff's counsel by interrupting the judge during his charge to the jury influenced the jury in his favour and gave them a right to a new trial.

*Held*, that (1) the certified copy of the agreement was sufficient; (2) the fact of the land being out of the jurisdiction was of no consequence, as complete relief could be given; (3) the evidence of the witness taken in short-hand was properly admitted; (4) the evidence offered in reply was properly admitted; (5) the defendants having admitted the agreement at the former trial, could not object to it at the subsequent one.

*Held*, also, that (1) there was no evidence of fraud on the part of the plaintiff; (2) the defendants had not the right to reply; (3) that, as to the objection of the interruption by counsel, it was for a Judge to preserve order at the trial, and as he did not interfere, the Court refused to do so.

*Lash, Q.C., and Holman for plaintiff.*

*McMichael, Q.C., McCarthy, Q.C., and Osler, Q.C., for defendants.*

[March 7.

VERRATT V. MCAULAY ET AL.

*Principal and surety—37 Vict. ch. 45, sec. 6, D.*

*Held*, that the liability of sureties on a bond given under 37 Vict. ch. 45, sec. 6, D., was not restricted to the default of the inspector in the duties of his office, but included also, the de-

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fault of a deputy inspector; and that such default was proved.

*Cressor, Q.C.*, for the plaintiffs.

*Osler, Q.C.*, and *Wink*, for the defendant.

HAMILTON PROVIDENT LOAN CO. V.  
CAMPBELL.

*Interpleader—Right to crops.*

The plaintiffs were mortgagees of land on which the crops in question were grown. On April 15th, 1882, the mortgagor, C., being in default, plaintiffs, in consideration of C. giving them a chattel mortgage on some of his goods, agreed that he should remain in possession as if there had been no default. In June plaintiffs took proceedings for ejectment against the land, recovered, on the 30th September, judgment by default, and on same day placed a writ of *hab. fac. pos.* in sheriff's hands, who took possession thereunder. On 2nd July possession had been taken of the land, under the mortgage, on behalf of plaintiffs but it did not appear that they continued in actual possession. On 11th July the defendant obtained a judgment against C. for \$860, and on 17th, execution was placed in sheriff's hands, and he seized and sold the growing crops thereunder. On interpleader to determine the title to the crops on the 17th July,

*Held*, that on that day the mortgagor, C., was entitled to the possession of the crops as against the plaintiff's, and so, therefore, was the defendant; and that the plaintiff's recovery on the 30th September did not estop defendant from shewing their right to the crops on the day claimed.

*Muir*, for the plaintiffs.

*G. H. Watson*, for the defendant.

DUCK V. CORPORATION OF TORONTO.

*Municipal corporation—Accident—Negligence—Notice—Drain.*

After a block pavement had been laid down on Queen street, one of the most travelled roads in the City of Toronto, a drain, about two and a-half feet wide, was opened out across the street to the street railway track and then tunnelled under the track. It was filled in with loose earth, not rammed down. On Sunday it rained, in consequence of which the earth was washed

down and sunk, leaving a very dangerous hole. On Tuesday or Wednesday some residents in the neighbourhood, seeing its dangerous condition, took some cedar poles and placed them lengthways in the hole. On Thursday night, about nine o'clock, the night being dark, and there being no light at the hole, and the street lamp not being sufficient to disclose the hole, the plaintiff, his wife and another, were driving along the road, and on reaching the place and not seeing the hole, the horse stumbled and fell, and the plaintiff was pitched out of the waggon and injured. The jury found that the accident was caused by the waggon coming in contact with the drain or hole. The defendants, however, urged that the evidence shewed that accident was caused by the waggon coming in contact with the poles, and as they had not put them there they were not liable.

*Held*, that the fact whether the accident was caused by the drain or the poles, was immaterial, for under the circumstances the defendants must be deemed to have had notice of the condition in which the drain was in at the time of the accident.

*Osler, Q.C.*, and *J. T. Small*, for the plaintiff.

*McWilliams*, for the defendants.

MORRISON ET AL. V. EARLS.

*Promissory note—Syndicate—Partnership—Rescission—Misrepresentation of price of land.*

Action on a promissory note for \$1,000, made by defendant to one M. The note was given in payment of the first instalment of the purchase money of a share in a syndicate, formed under an agreement which stated that "We the undersigned hereby covenant, promise and agree with each other to form ourselves into a syndicate" to purchase a lot of 300 acres of land in Manitoba from M. for \$50,000, divided into fifteen shares of \$3,333.33 each, to be paid to the trustee of the syndicate; the expenses of purchasing, advertising, selling, etc., to be borne proportionately by each member according to his shares; appointing M. trustee to form the syndicate; and on completion the members could re-appoint M., or any other person, trustee to carry out the effects of the syndicate. The syndicate was completed and the defendant appointed trustee; and a conveyance of the same made to him: It appeared

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that M., by fraudulently representing to defendant that the price he (M.) paid for the land was \$50,000, whereas it was only \$31,000; that the land was well worth that sum; was suitable for being laid out as town lots, and that it could be readily sold at largely remunerative prices, induced the defendant, who resides in Toronto and had no knowledge or means of acquiring knowledge, but relied on the truth of his statement, to enter into the agreement. The defendant, in consequence, asked to have the agreement and note rescinded.

*Held*, that M. was not in a position alone to put an end to the agreement and have the note cancelled, for that the so-called syndicate was in fact a partnership, and as the fraud was that of M. and not of the partnership, it would not avoid the agreement so long as all the partners were not asking for its rescission; and that the defendant's remedy must be by cross-action or counterclaim for deceit.

*J. H. Macdonald*, for the plaintiff.

*McMichael*, Q.C., for the defendant.

#### McFARLANE V. GILMOUR.

*Tramway—Accident—Negligence of fellow-servant.*

The defendant, the proprietor of extensive mills, constructed a tramway to carry lumber from one end of his yard to the other; but defendant's employees were permitted, for the purposes of their employment, to use the cars, which were drawn by a steam engine. The track was laid on ties placed on wet ground not very carefully prepared and very little ballasting done, and none where the accident happened. The plaintiff, one of the defendant's employees, was on one of the cars going to where he had some work to do, when the car was thrown off the track and the plaintiff was injured. It was attempted to be shewn that the accident was caused by the faulty construction of the road; but the evidence shewed that the cause was through a rail having been misplaced. It was proved that the defendant employed a competent foreman, who delegated the duty of keeping the track in repair to one B., a fellow-servant of the plaintiff, and, so far as appeared, was fully competent to perform such duty; and that B. neglected to replace the rail.

*Held*, that the accident having been caused

by the negligence of a fellow-servant, the defendant was not liable.

*Dickson*, Q.C., for the plaintiff.

*Bell*, Q.C., for the defendant.

#### CANADIAN PACIFIC R. R. CO. V. GRANT.

*Railways—Carriage of goods—Delay—Damages.*

The plaintiffs sued defendant for \$2,700, the balance alleged to be due on the carriage of timber to Quebec. The defendant counter-claimed for damages, sustained by reason of the plaintiffs' neglect and delay in furnishing cars as soon as notified that defendant's timber was ready, whereby defendant was delayed in loading and forwarding his timber to Quebec. The defendant also claimed damages for plaintiffs' neglect in forwarding cars to carry some 600,000 feet of timber, part of the contract; and also for loss of value of timber by reason of its being kept over until the following year; and expenses caused by the delay in carrying quantity carried.

*Held*, affirming the judgment of the learned Judge at the trial, that on the evidence plaintiffs were entitled to recover the \$2,700 claimed by them; and that the defendant was entitled to recover \$1,420 damages under his counter-claim for the delay in loading after notification; but was not entitled to recover any of the other items of damages claimed. Each of the parties to be entitled to costs as if the claim and counter-claim were a separate action.

*Bethune*, Q.C., and *McTavish*, for the plaintiffs.

*McCarthy*, Q.C., and *T. S. Plumb*, for defendant.

#### WEBSTER V. LEYS.

*Married women—Next friend.*

In an action by a married woman, commenced before the O. J. Act, it was held on demurrer that the plaintiffs must sue by next friend, and an order was made out accordingly. Subsequently and after the passing of the O. J. Act, the next friend became insolvent. On an application to *PROUDFOOT*, J., for the appointment of a new next friend, he made an order for such appointment, holding that he was bound by the previous order, and that nothing was shewn entitling the plaintiffs to take the benefit of the provisions of the O. J. Act.

Com. Pleas.]

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[Com. Pleas.

On appeal to the Divisional Court the judgment of PROUDFOOT, J., was affirmed.

*Davidson Black*, for the plaintiffs.

*Kingsford*, for the defendant.

#### FIELD V. GALLOWAY.

*Company—Action for unpaid stock—Payment.*

Action against defendant to recover from him, in respect of his unpaid stock in a joint stock company, the amount of an unsatisfied judgment recovered by the plaintiff against the company. The defendant set up as a defence, that one B. recovered judgment against the company and duly assigned it to one G., who duly assigned part of the money recovered, to the extent of \$500, to the defendant, which sum the defendant claimed to set off against the plaintiff's claim. The defendant further set up that one M., who was the assignee of the remainder of the judgment, recovered a judgment against the defendant in respect of his unpaid stock, which defendant paid to M., who released the company from their liability on the judgment against them, to the extent of the \$500. The assignment of part of the judgment to defendant and the recovery of the judgment by M. against defendant was after the commencement of the plaintiff's action.

*Held*, that the defence set up by the defendant constituted a good defence to the action.

*C. Ritchie*, for the plaintiff.

*W. Cassels, Q.C.*, for the defendant.

#### HALL V. GRIFFITH ET AL.

*Action, settlement of—Right of solicitors to costs.*

An action brought by a Montreal firm of solicitors for one C. against the now plaintiff, H., was suited for \$3,700, of which H. paid \$3,000 and gave the solicitors a note for \$5,500, made by the defendant Griffith, endorsed by Gimson, and held by H. as endorsee, out of which they were to take the \$700 and their costs. They sent a clerk to Toronto, where defendants lived, to settle matters. Not being able to do so he left the note with M. & Co., a Toronto firm of solicitors, for collection. M. & Co. commenced proceedings, and issued a writ which was served on the defendants. After this C. and the plaintiff settled the \$700 between them. A settlement was proposed

between the solicitors, which M. & Co. agreed to, provided their costs and the clerk's expenses to Toronto were paid; and defendants solicitors said they would recommend this being done. Negotiations for a settlement had been going on between the parties themselves, and on 26th November plaintiff proposed that defendants should pay \$5,000 clear of everything to the plaintiff, which on 2nd December was accepted by defendants. This settlement was effected without the knowledge of the solicitors. On 4th December defendants' solicitors were informed of the other parties being interested in the note besides the plaintiff. On 6th December the parties met and settled matters by plaintiff accepting \$5,000 in full of all claims under the action. The note which was held by M. & Co. was never delivered up to the defendants.

*Held*, that the effect of the agreement of 2nd December was that defendants should pay the costs, etc., and that the settlement made on the 6th December must either be treated as being intended to carry out such agreement, or if not, then that the settlement must be deemed to have been made with full knowledge through their solicitors and they must pay the costs, and that the settlement must be made through M. & Co.; that defendants in choosing to settle the amount of the note with H., without requiring the delivering up of the note, must be held liable for whatever lien or charge C. or others had upon the note, because they were not bound to pay it unless it was given up to them.

#### ONTARIO AND QUEBEC RAILWAY COMPANY V. PHILBRICK.

*Railways—Tender of compensation for lands taken—Omission to offer crossing until arbitration commenced—Less amount awarded—Costs—Railway Act, sec. 9, sub-sec. 19.*

By sec. 9, sub-sec. 19 of the Consolidated Railway Act, where the sum awarded by the arbitrators as compensation for land taken and damages is not greater than that offered by the company, the costs of the arbitration shall be borne by the opposite party, but if otherwise they must be borne by the company, and in either case they may, if not agreed upon, be taxed by the Judge.

On August 2nd, 1883, the O. and Q. R. W. Co. served P. with the statutory notices of their inten-

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tion to take 37 $\frac{1}{2}$  acres of P.'s land, and tendering \$3685 as compensation therefor and damages. This notice was abandoned, and another notice given on the 23rd November, offering the same amount of money, but reducing the quantity of land to 17 $\frac{1}{2}$  acres. The offer was refused and arbitration proceeded with. The railway cut off P.'s land from the highway, and on the plan attached to the notice no crossing was shewn. The arbitrators met on the 27th December, when the company tendered a deed binding themselves to make and maintain a crossing. The arbitrators assessed the compensation and damages at \$3516, or \$119 less than the amount tendered; but this was after taking into consideration the value of the crossing to P.

*Held*, by reason of the offer to make the crossing after the arbitrators met, the tender then made was not the same as that made prior to the arbitration: and, therefore, the provisions of the section as to costs did not apply.

A rule for a mandamus to the County Judge to tax the costs to the company, and for a prohibition preventing him taxing costs to P. was refused.

*Quare*, whether the Judge had under the circumstances any power to decide as to costs at all. If he should decide that he has such right his authority to do so may be questioned by an application to the Court for such purpose.

*G. T. Blackstock*, for the company.

*McMichael*, Q.C., and *Shepley*, contra.

#### CHANCERY DIVISION.

Ferguson, J.]

[March 4.]

LONDON AND CANADIAN CO. V. WALLACE.

*Will—Construction—Direction to carry on testator's business—Power to mortgage.*

A testator left his real and personal estate to trustees in trust to sell and invest the proceeds in such securities as they should think proper, and distribute the proceeds among his family as therein directed, and then proceeded:—

"Until sold as aforesaid, I direct that my trustees keep my schooners employed for freight and hire as far as possible, and for such purpose to engage all necessary assistants, and keep the said vessels in repair; and may store grain and other goods and merchandise in my warehouse for hire or storage; and may take such action as they think advisable in common with other joint proprietors to work and develope my interest in the mine known as

'The Baring Gold Mine,' but the outlay by them shall not at any time exceed \$1,000."

Except this liberty to employ a sum not exceeding \$1,000 in the development of the gold mine, there was no authority given by the will to employ any part of the estate in carrying on the business beyond what was embarked in it at the time of the testator's death.

The trustees carried on the business of the schooners and, as I understand, of the warehouse, and made certain repairs to the vessels, and by so doing became indebted to the Ontario Bank, and for the purpose of meeting this indebtedness contracted by themselves in carrying on the business, they made the mortgage in question in this action to the plaintiffs, who now sought payment or foreclosure.

The estate of the testator was not charged by his will with any sum except his debts, which were all paid before the execution of the mortgage.

It was shown that the plaintiffs had notice of the purpose for which the money borrowed on the mortgage was required.

*Held*, that the mortgage in question could not be upheld as a charge upon the property, and R.S.O. c. 107, secs. 7, 17 and 20, had no application to the case, though the plaintiffs were entitled to a personal order against those who had executed the mortgage.

All that a will, which directs the testator's business to be carried on, authorizes executors to do is to continue in it so much of the testator's estate as may be embarked in it at the time of his death.

*Smith v. Smith*, 13 Gr. 81, followed.

*F. Arnoldi*, for the plaintiffs.

*Moss*, Q.C., for the defendants.

Ferguson, J.]

[March 4.]

KINCAID V. READ.

*Husband and wife—Debtor and creditor—Liability of wife for husband's contract.*

Plaintiff agreed with J. R. to build a house on certain land for \$850. After building the house he discovered the land belonged not to J. R., but to J. R.'s wife, who at the time of the agreement was an infant, and was in no way a party to it. About a year afterwards J. R. and his wife sold and conveyed the land and house to M., an innocent purchaser. The plaintiff was only paid a portion of the \$850,

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and now brought suit to recover against the wife of J. R. the balance, or the amount by which the building or the house had increased the value of the land.

He argued that the credit which J. R. got from him must be regarded in the light of property for the purpose of a voluntary settlement by J. R. on his wife; and that, although the property having been sold to an innocent purchaser he could not have a lien, yet the potential equity was such as to entitle him to judgment against the wife of J. R. as asked, and he relied mainly on *Jackson v. Bowman*, 14 Gr. 156, and *Collard v. Bennett*, 28 Gr. 556.

*Held*, that inasmuch as there was no property or fund transferred or settled upon the wife that would have been liable to seizure by a creditor, the plaintiff could not recover against her.

S. H. Blake, Q.C., and Hudspeth, Q.C., for the plaintiff.

Cameron, Q.C., and Moore, for the defendants.

Ferguson, J.]

[March 4.]

## COTTINGHAM V. COTTINGHAM.

Sale of land—Description—Surplus—  
Compensation.

At a sale of land one of the parcels described in the advertisement of sale as "The east part of lot No. 9 in the 5th con. of Fenelon, one hundred acres," was sold at \$31 per acre, and in the conveyance to the purchaser was described as "one hundred acres more or less." The parcel really contained 124<sup>88</sup>/<sub>100</sub> acres, but this was not discovered by the parties interested in the purchase money until long afterwards.

On a petition filed claiming payment for the surplus 24<sup>88</sup>/<sub>100</sub> acres at the same rate per acre that the sale was made or that the purchaser deliver up possession of the same to the petitioners,

*Held*, that as the land was sold at so much per acre; that petitioners were entitled to payment for the surplus at the same rate, with interest from the time of sale; or that the purchaser should deliver up possession of the same to the petitioners, and, that the purchaser might elect which he would do; but if he had made any improvements he was entitled to be paid for them.

S. H. Blake, Q.C., and Hudspeth, for petitioners.

Hopkins, for the respondent.

Ferguson, J.]

[March 10.]

## OXFORD V. OXFORD.

Will—Construction—Right of *cestui que trust* to possession of the property.

A testator by his will provided: "Notwithstanding the directions hereinbefore contained I desire that if my son, W. O., returns to T. within five years from the date of my death my said executors shall hold in trust for him from the time of his return to T. said lots . . . during the term of his natural life, and shall pay over to him all rents, issues and profits thereof, and after his death shall divide the same between his children in such manner as he shall by his last will and testament direct and appoint, and in default of such direction or appointment to divide etc., etc."

*Held*, that the intention of the testator was that the possession of the property should remain with the trustees, and an action by the *cestui que trust* to recover such possession was dismissed with costs, the evidence tending to show that it was not the personal occupation, but rather the management of the property that was sought.

Moss, Q.C., for plaintiff.

Blake, Q.C., for defendants.

Ferguson, J.]

[March 10.]

## MAKINS V. ROBINSON.

## Mechanics lien—Conveyance of premises before registration of lien.

R. and E. (partners) employed M. to do certain work and furnish certain machinery for their mill, the last of which was furnished on the 28th July, and a lien was registered by M. on the 24th August; but on the 24th July R. and E. had, without the knowledge of M., conveyed the premises to P. who had registered his deed on the 29th July.

*Held*, M.'s lien was not affected by the conveyance, and that he was entitled to judgment to enforce his lien.

*Held*, also, under s. 2, s.-s. 3 of the Mechanics' Lien Act, that P.'s name not being mentioned in the lien registered should not invalidate the lien.

S. H. Blake, Q.C., and Stewart, for plaintiff.

G. T. Blackstock, for purchaser.

Moore, for defendant, Elliot.

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Ferguson, J.]

[March 10.]

## SAUNDERS V. BREAKIE.

*Will—Construction—Description of lands—Waste—Injunction.*

A testator by his will devised his property as follows: "First, I devise and bequeath to my son, W. A. S., the easterly part of my lot No. 6 in the 3rd con. west of Yonge St., in the township of York, being described as  $\frac{1}{2}$  part of the length and the entire width, measuring westward from the easterly limit of the said lot No. 6, and containing by admeasurement  $66\frac{1}{2}$  acres, etc. Second, I give, devise and bequeath unto my son, H. D. S., all my personal property, . . . and I also devise and bequeath to my said son, H. D. S., the middle part of my said lot No. 6 in the 3rd con. west of Yonge St., in the said township of York, being described as  $\frac{1}{2}$  part of the length and the entire width, measuring westward from the land heretofore devised to my son, W. A. S., of the said lot No. 6, and containing by admeasurement  $66\frac{1}{2}$  acres, etc. Third, I devise and bequeath to my daughter, Annie, the wife of J. B., of the said township of York, farmer, the remaining  $\frac{1}{2}$  part of my said lot No. 6, in the 3rd con. west of Yonge St., in the said township of York, being described as  $\frac{1}{2}$  of the length and entire width of the said lot No. 6, measuring westward from the land heretofore devised to my son, H. D. S., and extending to the westerly limits of said lot No. 6, containing by admeasurement  $66\frac{1}{2}$  acres, be the same more or less, to have and to hold the said hereby devised land and premises unto, and to the use of my said daughter, A., for, and during the term of her natural life, with remainder thereof on her decease to the children of her body and their heirs and assigns for ever."

The following was a codicil: "I do hereby alter . . . my said will so that should my said daughter, A., the wife of J. B., die without issue or should outlive her issue, the remainder thereof shall revert to my own heirs, share and share alike."

The testator had during his lifetime sold and conveyed away 12 acres from the easterly  $\frac{1}{2}$  part of the lot, and 5 acres from the centre  $\frac{1}{2}$ .

*Held*, that the land was virtually described by metes and bounds, and that each devisee took, according to the measurements given,

viz.,  $\frac{1}{2}$  part of the length of the lot and the whole width of it, as the testator had title to and power to devise.

*Held*, also, that on the application of the reversioner the defendants, J. B. and A. B., while they had the right to cut and destroy timber for the purpose of properly cultivating the land, they had no right to cut and sell the same timber, even if cut for the same purpose, and an account was ordered to be taken of that already sold and an injunction granted restraining the cutting and selling the timber from off the land.

*MacLennan*, Q.C., for plaintiff.

*C. H. Ritchie*, for adult defendants.

*Plumb*, for infant defendants.

Boyd, C.]

[March 12.]

## CARD V. COOLEY.

*Will—Construction—Widow's election between dower and devise.*

A testator devised to his wife "one half of the place where I now live, being etc., . . . so long as she shall live, and no longer . . . also the half of all the goods and chattels I may own at the time of my demise to dispose of as she may think proper for the benefit and partial support of my daughter . . ."

He also devised "to my grandson . . . the place or homestead where I now live, it being (same property) with all that appertains thereto subject nevertheless to the following conditions, that is to say: my wife shall have quiet and peaceable possession of one-half of all said premises with all that appertains to said half of said homestead for her own use and benefit as long as she shall live."

There was also a devise to the grandson of one-half of all the goods and chattels he owned at the time of his death.

*Held* (reversing the decision of the Master at Belleville), the widow was not entitled to dower in the homestead and the life estate in half of it, but must elect which she would take.

*Dickson*, Q.C., for appeal.

*Clute*, contra.

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[Chan. Div.]

Boyd, C.]

[March 12.]

RE QUIMBY, QUIMBY V. QUIMBY.

*Will—Construction—Annuity and share under statute of distributions—Dower—Election.*

A testator by his will directed his trustees, 1. To pay to his wife so long as she should remain his widow the clear yearly sum of \$500; and in the event of her marrying again, the yearly sum of \$300 only, from the time of such marriage. 2. When his son should attain the age of twenty-one years to make over to him one-half of the estate. 3. When the son should attain the age of thirty years to make over to him the whole of the residue of the estate—subject, however, to the payment of the annuity to the wife as aforesaid. 4. If the son should die before attaining the age of thirty years to hold "the said real and personal estate moneys and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the Statute of Distributions."

The last codicil changing the trustees, constitutes them and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, trustees of all the property in the will mentioned, and with all the powers originally given by such will to the trustees.

The son and only child attained the age of twenty-one years, received half of the estate, and died before attaining the age of thirty years.

*Held*, that the use of the word *assigns* would point to the inference that the distributees under the statute would be trustees for the payment of the annuity to the widow, and that she was entitled to her share (one-half) of the residue under the Statute of Distributions in addition to her annuity.

*Held*, also, that as the testator had dealt with his whole estate, real and personal, in the residue in question, as a blended fund to be distributed after the manner of personalty, that the widow was not entitled to dower out of the real estate as well, but was put to her election.

*Chalmers v. Stovill*, 2 Ves. & Bea. 203, and *McGregor v. McGregor*, 20 Gr. 45, referred to and followed.

*Moss*, Q.C., and *Carscallen*, for plaintiffs.

*Hoyles*, for the trustee.

*W. A. Reeve* and *Tetzels*, for other defendants.

Boyd, C.]

[March 12.]

MCDougall v. LINDSAY PAPER MILL CO.

*Master's Report—Priority—Jurisdiction of Master to question judgment.*

Plaintiff having brought his action on a mortgage and obtained a judgment under Rule 78, O.J.A., a reference was ordered to the Master at Lindsay.

On the reference several judgment creditors were made parties, and the Master decided that they, although subsequent in date to the plaintiff's mortgage, were entitled to priority over the mortgage on the ground that the mortgage was not sanctioned or ratified by the shareholders of the company.

*Held*, on appeal, that the Master had no jurisdiction to question the validity of the mortgage or the judgment founded thereon, and that the other judgment creditors are bound by the judgment the same as the defendants, unless they move to vary or set it aside, as notified by notice T. served under G. O. 444, and that the priorities should be reversed, the plaintiff being declared to be first.

*Moss*, Q.C., and *Hudspeth*, Q.C., for appeal.

*Osler*, Q.C., and *M. McIntyre*, contra.

Ferguson, J.]

[March 19.]

WARDROPE V. CANADIAN PACIFIC R. W. CO.

*Garnishee proceedings—Debtor and creditor—Evidence.*

A judgment creditor does not become a creditor of the garnishee by service of the garnishee order upon him. There is not the existence of a debt from the garnishee to the attaching creditor. He has the right against the garnishee that is expressly given him by the estate, and nothing more; and although the garnishee can be compelled to pay the attaching creditor if the course pointed out by the statute is pursued, the position of the garnishee is not that of a debtor to the attaching creditor. He continues to be a debtor to his own creditor until he has paid into Court, or to the attaching creditor after order so to pay, or a levy of the amount has been made of his property, when he ceases to be a debtor as to the amount paid or levied.

*Held*, therefore, that the plaintiff, who had obtained a garnishee order, garnishing a debt due from the B. and O. Railway to W. S., his judgment

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[Prac.]

debtor, (which railway was now represented by the defendants) was not a "creditor" of the B. & O. Railway, holding a *bond fide* claim against them within 27 Vic., c. 57, s. 10.

A copy of an order and of a writ of execution issued pursuant thereto admitted in evidence, a witness testifying that he had made the copies from the originals, which were satisfactorily proved to be lost.

A memorandum or entry found in a book in the office of a sheriff, appearing to be a memorandum or entry of the receipt of a certain writ by the sheriff, admitted in evidence, the sheriff and the then deputy sheriff being dead, and the existing deputy sheriff having proved the handwriting, and the place from which the book was produced.

*J. MacLennan*, Q.C., and *Francis*, for the plaintiff.

*T. Lash*, Q.C., and *Walker*, for the defendants.

Ferguson, J.]

[March 24.]

ST. THOMAS V. CREDIT VALLEY R. W. CO.

*Specific performance against railway—Agreement to run trains.*

By deed of September 6th, 1881, the defendants covenanted with the plaintiffs, for valuable consideration, that all their passenger trains should run to and from a small station on Church street in the City of St. Thomas, for the purpose of checking baggage, and of accommodating passengers.

Subsequently, about August, 1882, the defendants ceased to run any of their passenger trains to or from the station in Church street.

The plaintiffs now brought this action, claiming that the defendants should be ordered to run all their passenger trains from this station, as agreed, seeking specific performance of the agreement.

*Held*, that specific performance could not be granted, and the plaintiffs must be left to their remedy in damages; for it appeared beyond doubt that in order to perform what the plaintiff asked either running powers would have to be obtained from the C. P. R. Co., who were owners of the station in Church street, or a new line of road built by the defendants for a considerable distance, at great expense and difficulty; servants would have to be kept, and there would be

involved the doing of continuous daily acts, such as the providing and selling of tickets, providing checks for baggage, and the doing continuously of all those things that are usually done at a passenger railway station, and under such circumstances the Court would not order specific performance.

*Lord Lytton v. Great Western Railway Co.*, 2 K. & J. 394, and *Wallace v. Great Western Railway Co.*, 3 O. A. 44, distinguished.

*D. McCarthy*, Q.C., and *T. S. Plumb*, for the plaintiffs.

*C. Robinson*, Q.C., *J. Bethune*, Q.C., and *Blackstock*, for the defendants.

## PRACTICE.

Mr. Dalton, Q.C.]

[January.]

GAGE V. CANADA PUBLISHING CO. ET AL.

*Security for costs—Insolvent surety—Right to new surety.*

When one of the sureties in a bond given to secure the costs in the Court below became worthless the Master in Chambers held that the respondent was entitled to a new one.

*Holman*, for plaintiff.

*Davidson*, for Publishing Co'y.

*Barwick*, for defendant Beatty.

Mr. Dalton, Q.C.]

[January.]

LOVELACE V. HARRINGTON.

*Examination—Notice of appointment—Rule 455.*

Rule 455 O. J. A. applies to the Chancery Division of the High Court of Justice.

A copy of appointment to examine was served on the plaintiff's solicitor on a Saturday for a Monday.

*Held*, insufficient notice.

*Holman*, for plaintiff.

*Hoyle*s, for defendant.

Prac.]

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[Prac.

Rose, J.]

[January.

## PERKINS V. MISSISSIPPI.

*Cause of action—Breach of contract—Jurisdiction—  
Rules 45-8 O. J. A.*

An action for damages for breach of contract by the defendants, a corporation in Liverpool, England, in not delivering certain machinery at the railway station nearest to Ottawa.

The writ and statement of claim were served on the defendant's agent in Montreal, and under Rule 48 O. J. A. the plaintiffs now applied for an order allowing the service on the ground that the case was one within Rule 45. The affidavit made and filed by the plaintiff's solicitor set out,

"2. The paper writing shown to me, marked Exhibit A, is a true copy of the statement of claim delivered in this action ;"

"3. This action is brought to recover damages for breach of contract on the part of the defendants in not delivering the machinery, in the statement of claim mentioned, at the railway station nearest to Ottawa under the terms of the contract."

But the affidavit did not state that the deponent knew the fact, either of his own knowledge or on information and belief, nor that the defendants ever entered into a contract with the plaintiff and undertook to deliver the machinery at the railway station nearest to Ottawa.

The bill of lading containing the contract in question provided *inter alia* "that the machinery in question is to be delivered at the port of Montreal unto the G. T. R. Co., by them to be forwarded, upon the conditions above and hereinafter expressed, thence per railway to the station nearest to Ottawa, and at the aforesaid station delivered to order, . . . freight . . . to be paid by the consignees." "That the goods are to be delivered from the ship's deck, *when the shipowner's responsibility shall cease. Through goods sent forward by rail are deliverable at the railway station nearest to the place named hereafter.*" "That any loss, damage, or detention of goods on this through bill of lading for which the carrier is liable must be claimed against the party only in whose possession the goods were when the loss, damage, or detention occurred."

*Held*,—1. That the affidavit did not afford the proof required under Rule 48; 2. That the

bill of lading showed no contract on the part of the defendants to deliver at Ottawa, or the nearest station to Ottawa; nor any contract, the breach of which was made in Ontario, because, if there was such a contract in the bill, force and effect could not be given to the stipulations in it that the shipowner's responsibility should cease when the goods were delivered from the ship's deck, etc., and hence though leave would be given to file further affidavits; such leave was therefore unnecessary.

And, again, if there was a contract, and its terms expressly exempted the defendants from any and all liability for damage for any loss, etc., arising beyond their line, no damage for a breach in this Province would result to the plaintiff, and though technically within Rule 45, sub-sec. c., discretion should (if any exist) be exercised in refusing to allow the service.

In cases of this kind an order allowing service should not be made on an undertaking of the plaintiff's solicitor to prove a cause of action, etc., within the jurisdiction, as it shifts the onus of proof to the plaintiff, and requires him to conduct, it may be, a long and expensive litigation to procure a decision on a point properly raised at the commencement of the action.

*Service disallowed.*

*Lefroy*, for plaintiff.

*Richards*, Q.C., contra.

Mr. Dalton, Q.C.]

[January.

## ADAMS V. BLACKWELL.

*Interpleader—Sheriff.*

S. placed an execution in the sheriff's hands on 11th December, and A. one on the 12th December. On the 20th the landlord put in a claim for rent. The sale took place on the 21st; the sum of \$1,707.06 was realized. On the 24th H. notified the sheriff that he claimed all the moneys in his hands, and not to pay any over to anyone else. On the 27th December the sheriff paid S. in full and took a bond of indemnity.

A motion by the sheriff for an interpleader order against H. and the landlord was refused with costs.

*Aylesworth*, for the sheriff.

*Holman*, for the plaintiff.

*H. J. Scott*, Q.C., for the landlord.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Mr. Dalton, Q.C.]

[January.

BANK OF COMMERCE V. BANK OF BRITISH  
NORTH AMERICA.*Third party—Amendment.*

A cheque had been drawn upon the plaintiffs, payable to the Hamilton Tool Co'y, and upon an endorsement, purporting to be that of the Tool Co'y., the defendants cashed the cheque, and upon presentation by them to the plaintiffs, were repaid the amount.

The Tool Co'y repudiated the endorsement, and the plaintiffs sued the defendants for the amount of the cheque.

This was an application to add a third party, based on an affidavit of the defendant's solicitor, that he had good reason to believe, and did believe that the third party was the beneficial plaintiff, and that there were equities which would attach as against the third party, if he were a third party, which would not attach against the present plaintiffs.

The motion was refused, but leave was given to the defendants to amend by alleging that Ryan, the third party, was the beneficial plaintiff, and to set up any defence that might be open to them on that ground.

*Aylesworth*, for the defendants.

*Holman*, contra.

Rose, J.]

[Feb. 29.

## WALTON V. WIDEMAN.

*Changing place of trial.*

An appeal by the plaintiff from the order of the Master in Chambers, changing the place of trial from Toronto to London.

The plaintiff lived and carried on business in Toronto, the defendants in Parkhill, near London. The action was brought upon a contract to purchase certain goods obtained by an agent of the plaintiff, who solicited the order in Parkhill, where the contract was signed. The goods were to be delivered by the plaintiff to the Grand Trunk Railway Company in Toronto. The defence set up fraud in obtaining the contract. The plaintiff proposed to have the action tried at Toronto. The defendants swore that they intended to call six wit-

nesses, that the cause of action arose in Parkhill, and that the expense of a trial at Toronto would be greater by \$30 than at London. The plaintiff swore that he intended to call six witnesses and give evidence himself, that four of the six lived in Toronto, one east of Toronto, and one in Parkhill, and that the extra expense of a trial at London would be about \$25.

*Held*, that the cause of action arose in Toronto, and that there was no such preponderance of convenience in favour of London as would justify a change of the place of trial, following *Noad v. Noad*, 6 P. R. 48; *Davis v. Murray*, 9 P. R. 222; and *Robertson v. Daganau*, 19 C. L. J., 19.

Appeal allowed and venue restored to Toronto.

*F. E. Galbraith*, for the appeal.

*Aylesworth*, contra.

Boyd, C.]

[March 24.

## FREEL V. MACDONALD ET AL.

*Local Masters—Jurisdiction—Judgment—Rules*  
80, 422 O.J.A.

Rule 422 O.J.A. and its sub-section (a) must be read together and hence the limitation in the sub-section of the jurisdiction of the County Judge in certain cases curtails that of local Masters in similar cases.

The local Master at Hamilton, in the county of Wentworth, gave leave to sign final judgment under Rule 80 O.J.A. in an action in which the solicitor for the defendants had his place of residence and office at St. Catharines, in the county of Lincoln, and no office in Hamilton.

*Held* to be *ultra vires* under Rule 422.

*Hoyles*, for the defendants.

*Holman*, for the plaintiff.

# Canada Law Journal.

VOL. XX.

APRIL 15, 1884.

No. 8.

## DIARY FOR APRIL.

20. Sun.....1st Sunday after Easter.  
21. Wed.....St. George's Day.  
22. Thur.....Earl Cathcart, Governor-General, 1846.  
27. Sun.....2nd Sunday after Easter.  
29. Tues...Primary Examinations for Students-at-Law and Articled Clerks.

TORONTO, APRIL 15, 1884.

WE have a great admiration for the critic of the *Canadian Law Times*. He makes his office no sinecure. He is paid to criticize, and criticize he does. Sometimes, perhaps, he shows *trop de zèle*, but that is a failing of all earnest benefactors of their species. In his criticism of Mr. Holmsted's "General Rules and Orders of the Courts of Law and Equity," he has covered himself with glory. We were weak enough to find nothing in the book but matter of praise. Not so the critic of the *Canadian Law Times*. He places his finger with telling force (and this is the only criticism attempted) on the "Addenda and Corrigenda" appended to Mr. Holmsted's volume. With piquant sarcasm he calls it a "rather lengthy treatise on addenda and corrigenda," and observes with much irony that the "subject has been exhausted by previous authors." We ourselves prefer to gather instruction from the *Canadian Law Times*, rather than in any way criticize its utterances. We repudiate any idea in this instance of criticizing, but we ask for "more light." To our feeble intellects a long list of "addenda and corrigenda" appended to a book is an indication of two things—industry and honesty. Our contemporary cannot object to industry and honesty. It is itself a monument of the one and the guardian of the other. *Addenda*, as the

critic of the *Canadian Law Times*, being a scholar, is well aware, means "things to be added;" *corrigenda*, means "things to be corrected." Now when an author appends to a book a long list of *addenda*, he seems to us to give a proof of industry, inasmuch as he shows he is working at his subject up to the last moment, and is in fact adding to the information contained in his book, and in the case of Mr. Holmsted's book it will be found that the number of "addenda," containing new citations and authorities, are far in excess of the *corrigenda*. But *corrigenda*, in their turn, are a proof of honesty to our view. For among the common crowd of readers who are not writers in the *Canadian Law Times*, errors, misprints, and slips on the part of an author are extremely likely to go undetected, unless the author himself for the sake of accuracy candidly calls attention to them.

## RECENT ENGLISH DECISIONS.

THE January and February "Law Reports" comprise 25 Ch. D. pp. 1-242; 12 Q. B. D. pp. 1-141; and 9 P.D., pp. 1-26.

In the first of these a great number of the cases are on points of bankruptcy law, and others on points of practice. The former do not require mention here, and the latter will be noted in due course among Recent English Practice Cases. Of those which do not fall under either of these denominations, the following require special notice.

FOREIGN PATENT—"RIGHT TO SELL ARTICLES IN ENGLAND"—INJUNCTION.

The first case, *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent*

## RECENT ENGLISH DECISIONS.

*Sand Blast Company*, was an application for an interim injunction under the following circumstances: The defendants were owners of a certain patent in England, and of a similar patent in Belgium, and granted a license to use the patent in Belgium to the plaintiffs; and the plaintiffs under this license, manufactured articles in accordance with the patented invention in Belgium, and sold them in England; whereupon the defendants issued a circular warning persons engaged in the trade that the importation and sale of articles made in foreign countries, except by themselves, would be a violation of their patent. The plaintiffs then brought this action to restrain the issue of this circular, and applied for an interim injunction. The Court of Appeal held that Pearson, J., was right in refusing the injunction. It was contended by the plaintiffs that although there was not in express terms in the license any grant of a right to sell the articles in England when manufactured under the license in Belgium, yet this was necessarily implied, and was a right which was necessarily carried to the plaintiffs by the grant of the license which the defendants had made to them. This is pointed out to be fallacious reasoning, for that though it was the consequence of the plaintiffs being in Belgium lawful manufacturers and lawful owners of the goods, and incident to that ownership, that they could sell anywhere where the law of the country did not prevent them selling; yet the mere fact that the grantors of the license had a monopoly in England would not impart, as a matter of construction into the license, the grant to interfere with that monopoly, when there had been no express grant of a right to sell in England. As Cotton, L.J., says at p. 8: "The license is merely a license, and puts the plaintiffs in no better position than if they were grantees of the Belgian patent." And as to the circular complained of, he says:

"I may say, for my own part, I think that where circulars of this kind are honestly issued the Court ought not to interfere, at least till the hearing of the cause, to stop the circulation of them, unless there is a very strong *prima facie* case in the evidence before the Court that there is a violation of some contract entered into between the plaintiffs and the defendants." *Betts v. Wilmott*, L. R. 6 Ch. 239, is commented on and distinguished.

FACTOR—LIEN—RESTRICTION PLACED BY PRINCIPAL ON POWERS OF FACTOR.

At p. 31 is a case, *Stevens v. Biller*, to which it is merely necessary to state that the point decided is that an agent who is entrusted with the possession of goods for the purpose of sale, does not lose his character of factor, or the right of lien attached to it, by reason of his acting under special instructions from his principal to sell the goods at a particular price and to sell in the principal's name. The case would from the report appear to be one of first impression.

COMPANY—COSTS OF FORMATION OF COMPANY.

At p. 103 is the case of *In re Rotterdam Alum and Chemical Company*, where P., who on the retainer of M. had acted as solicitor in respect to the formation of a certain limited company for the purpose of taking over M.'s business, now, the company having been formed, preferred a claim against it for his costs incurred about its formation, and, failing to prove any contract on the part of the company to pay him, nevertheless urged that he was entitled to recover on the ground that the company having had the benefit of his services ought to pay for them. The Court of Appeal held that this argument could not prevail. Lindley, L.J., says, p. 111: "it is said that P. has an equity against the company, because the company has had the benefit of his labour. What does that mean? If I order a coat

## / RECENT ENGLISH DECISIONS.

and receive it, I get the benefit of the labour of the cloth manufacturer; but does any one dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done for somebody else he is liable to pay the person who did the work." And Fry, L.J., points out in like manner that it is by no means universally true that where a person takes property on which labour has been expended and gets the benefit of that labour he must pay for it:—"It is not true," he says, "where the work was done for the vendor of the property, and that was the case here, these costs having been incurred on the retainer of M."

## TRANSFER OF SHARES PENDING WINDING UP—COMMITTEE OF ONE.

The next case calling for special notice, is *In re Taurine Company*, at p. 118. The question is here raised and decided whether shareholders, who know that the company is on the eve of being wound up voluntarily, can, nevertheless, make a valid transfer of shares? The Court of Appeal decides that they can. As to this Cotton, L.J., says, at p. 130: "The argument urged was this, that when it was apparent the company would be wound up for whatever reason, then the power of transfer given by the articles was at an end, and could not be exercised . . . In my opinion it cannot be held that the power of transfer given by the articles, and allowed by the Act of Parliament, was at an end when notice was given that there would be a meeting to wind up this company. The time which the Companies' Act (cf. 41 Vict. c. 5, s. 8, ss. 1, O.) fixes as the time after which no transfers can be made is the commencement of the winding up, and in the case of a voluntary winding up, even after that time, transfers may be made if they are allowed by the liquidators, which is not quite consistent with the view urged on us by Mr. B. He contended that the powers were given with reference to the

company as a going concern, and not with reference to the company when known to be coming to its end, and to be on the eve of being wound up. We need not go through the books to show how constantly honest transfers registered before the commencement of the winding up have been treated as effectual, although made when it must have been known that the company could not go on."

Another curious point arose in this case: one of the articles of the company provided that "the board (of directors) may from time to time delegate to any such local or other committee, managing director, manager, agent or representative, all or any of powers, authorities and discretions of the board." One of these discretions was the approval of transfers of shares. Acting under the above article, the board of directors appointed one of their number, "a committee with all the powers of the board"; and he subsequently, sitting alone, approved of several transfers. The Court of Appeal held that he had power to do so, for that a committee of the board of directors need not consist of more than one person. Cotton, L.J., says, at p. 132: "There is nothing in my opinion, in the articles to prevent the appointment of a committee of one. It is very unusual, but still it may be done. . . . A committee means a person or persons to whom powers are committed which would otherwise be exercised by another body"; and Fry, L.J., at p. 142: "No doubt it is an extraordinary power, but it is contained in the articles, and no creditor can complain that it was exercised."

## WILL—"MONEY" EQUIVALENT TO "PERSONAL ESTATE."

At p. 154, *In re Cadogan, Cadogan v. Palagi*, is a curious decision in which a bequest of "one half of the money of which I am possessed to H., and the remainder equally between O. and S., and after them to their children," was in the light of the context, and circumstances of

## RECENT ENGLISH DECISIONS.

the estate, held by Kay, J., to pass all the personal estate consisting of cash, securities, leasehold, and furniture. He says: "It is said quite truly, that there is a popular and colloquial use of the word 'money' which is equivalent to personal property, and that in this will this larger meaning should be given. Speaking for myself, I must say I have not the smallest doubt that the testatrix used the word in that larger sense, and I believe that would be the opinion of any person, not a lawyer who read this will. Am I bound by authority to decide otherwise?" He answers this question in the negative, and cites *Prichard v. Prichard*, L.R. 11 Eq. 232, as "at least an expression of opinion, that there should be no absolute technical meaning given to such a word as 'money' in a will, but that its meaning in every case must depend upon the context, if there is any which can explain it, and upon those surrounding circumstances, which the Court is bound to take into consideration in determining the construction."

## TRADE-MARK—PATENT.

In *re Ralph's Trade-mark*, *Ralph v. Taylor*, p. 194, a *semble* of Pearson, J., is to be noted to the effect that the name of a patented article which has become known in the trade is not a fitting trade-mark after the expiration of the patent, since it would have the effect of extending the patent beyond its legal limit. He says, at p. 199: "that point was taken and considered by my predecessor, the present Lord Justice Fry, in the *Linoleum case*, L. R. 7 Ch. D. 834. Fry, L.J., then came to the conclusion that it was impossible for this Court so to construe the Trade-marks Act, as to do away with what has been the law of the land from the time of King James downwards, namely that the patent comes to an end at the expiration of a period of fourteen years, unless it is

renewed and a further grant given, as is done in some cases."

## "TRADE OR BUSINESS"—LEAVE—CHARITABLE INSTITUTION.

In *Rolls v. Miller*, at p. 206, the question was whether a "Home for Working Girls," being a charitable institution, where the inmates were received upon payment of a small sum for board and lodging, but from which no profit was derived, was a "business," within the meaning of a covenant in a lease of a house that the lessee should not "use exercise or carry on, in or upon the premises hereby demised, any trade or business of any description whatsoever." Pearson, J., decided that it did. He says: "To my mind the word 'business' is a very much larger word than 'trade,' and you are not to reduce, in a covenant of this kind, the word "business" simply to that which would be a trade. . . . Now is this or is it not a business? The persons who hold the house are not the persons who live in it; the persons who manage the house are not the persons who are entertained in it. Those who come to the house come there and go from there at their own free will, and apparently they come there for a shorter or a longer period; they pay certain rents and other sums of money according to what they have in the house, whether it be simply for bed-rooms or whether it be for bed-room and board as well. Under these circumstances I think the occupation of this house is an occupation of something very different from that of a private dwelling-house, and I know no other word in the language which would express the purpose for which the house is open better than the word 'business.' I am of opinion that it is open for a 'business,' for something about which people employ themselves sedulously, something of a nature which would be an ordinary business if it were carried on by an individual with the inten-

## STATEMENTS BY PRISONERS' COUNSEL.

tion of making a revenue out of it. . . . Then if that be so, I cannot say that there is any distinction made in this covenant between a business carried on for profit and a business carried on for charitable reasons only."

A. H. F. L.

## SELECTIONS.

## STATEMENTS BY PRISONERS' COUNSEL.

"B.," who is generally supposed to be Lord Bramwell, writes to the *Times*:—"Till Chief Justice Cockburn ruled as he did, no one ever supposed that a prisoner or his counsel had a right to state facts the existence of which he had no evidence to prove. The decision was an entire novelty. There had never been a doubt or question on the matter. It is impossible to add to the authority of the opinion recently expressed by the judges, but, without being presumptuous, one may be permitted to do what of course they did not—viz., give reasons for that opinion. The statement of facts is either that the jury may act on it as true or it is idle. But to hold that the jury may act on it, is to hold that it is evidence, and then this consequence follows—that a prisoner who cannot give evidence on oath and subject to cross-examination, may give it not on oath, and, what is much more important, without being cross-examined. Such statements may not be made in civil cases. I repeat there is neither precedent, reason, nor analogy to justify the allowing of such statements, nor till it was so ruled was there authority. Let me not be mistaken. It is, and always was, and must be allowed for a party to a suit, civil or criminal, to contend that the evidence was consistent with and tended to prove that of which there was no direct evidence. But though this is clear to me, it is equally clear that there are cases in which the prisoner must of necessity be allowed to make these statements. As is truly said in your yesterday's leader, the unhappy prisoner in the dock with all eyes on him is 'dazed or confused,' and when he is asked if he will

put any questions to the witness called against him, all he understands is that he may speak, and he immediately begins to tell his story. To tell him that that is wrong, as is sometimes done by an officious turnkey in the dock, is to add to his confusion and to shut his mouth. To say that such a man must defend himself according to rule is in effect to say he must be undefended. He must be allowed to say what he wants to say. It would be the most grievous injustice if he were not. For it constantly happens that what he says contains in it the materials for a question which the judge suggests to him to put or puts for him. As for instance, 'he hit me first.' I say therefore of necessity a prisoner undefended by counsel must be allowed to 'run on,' and in so doing state facts which, perhaps, he cannot prove. Further, it cannot be told while he is stating them that he cannot prove them. But this allowance should not go beyond the necessity for it, and that does not exist where the prisoner is defended by counsel. It is monstrous that counsel should be able to say that for their client which he could not, perhaps would not, say for himself. Of course the Bar may be trusted; but to save a man's life and win a difficult case is tempting, and 'lead us not into temptation.' I quite agree with your leader that the defendant, in a criminal case, ought to be able to give evidence if he wishes to do so, on oath and subject to cross-examination. And I agree that the time will come when it will be as much a matter of astonishment that the law was once otherwise as it now is that the law formerly shut out the evidence of parties to civil cases. But that will not get rid of the necessity for letting the defendant tell his own tale his own way when he is not defended by counsel. Mr. Justice Stephen first pointed out the necessity of dealing with prisoners in this way."

Master's Office.]

WILEY V. LEDYARD.

[Master's Office.]

## REPORTS.

## ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

## MASTER'S OFFICE.

## WILEY V. LEDYARD.

*Mortgage—Taking account in M.O.—Collateral security—Statute of Limitations—Arrears of interest—Pleadings.*

On a reference to take accounts in a mortgage case, it is not open to the defendants to contend that the original loan was *ultra vires*, nor can any defence be raised in the Master's Office, which, if allowed, might result in determining that the Court had made a nugatory order of reference.

When certain securities had been assigned as collateral for the payment of a promissory note of \$1,000, which note was partly paid and a new note given, such securities may be held until the debt is discharged by payment.

Though the remedy of a creditor to recover a debt be barred by the Statute of Limitations, he may hold the collateral securities for such debt until paid.

When no claim for arrears of interest is specially made by the pleadings, and where there is no covenant to pay interest, only six years arrears of interest can be recovered.

Only such claims for debt as are set out in the pleadings can be recovered in the Master's Office under an order of reference to take accounts.

[Toronto, Dec. 10, 1883.]

The facts of the case and the arguments appear in the judgment of the Master in Ordinary.

J. R. Roaf, for plaintiff.

W. A. Foster, and G. H. Watson, for defendants.

MR. HODGINS, Q.C.—The plaintiff claims as assignee of a mortgage in respect of certain loans originally made to the defendant Ledyard by the Rent Guarantee Loan Aid and Investment Company. These loans were held to be *ultra vires* of the Company in a suit for the winding up of its affairs: *Walmsley and Rent Guarantee Co.*, 29 Gr. 484.

Mr. Foster, for the defendants, contended that it was open to him to show that the loan, being beyond the powers of the company to make, could not be assigned or recovered in this action; but I ruled against his contention on the ground that the subordinate Court of the Master was not the forum before which such an issue could be decided; for if it entertained and adjudicated in favour of his contention it would be in effect determining that one of the Divisional Courts—to which the tri-

bunal of the Master is subordinate—had made a nugatory order of reference. This view is sustained by the judgment of the Supreme Court in *Bickford v. Grand Junction Railway Company*, 1 S. C. R. 696. Mr. Justice Strong, who delivered the judgment of the Court, says on page 726: "The general practice of the Court of Chancery of Ontario, according in this respect with the practice which prevailed in England before the abolition of the office of Master, is that a question such as this, the invalidity of a mortgage deed, should be raised by the pleadings, and adjudicated by the Court on the hearing of the cause. We can find no exception to this cardinal rule of equity procedure, save in some few respects where the general orders of the Court of Chancery have authorized the Master to deal with matters of account which formerly required special directions in the decree, and which have no relation to this case. If the doctrine of the Court of Appeal (23 Gr. 340) were to prevail, it is hard to suppose any case in which the Master, under a reference to take the account in a mortgage suit, might not assume the jurisdiction to decide upon the validity of the mortgage deed. If the mortgagors are to be at liberty to say in the Master's Office that there is nothing due on this mortgage deed, because it was beyond the powers of the respondents as a corporation to make it, why should they not also be heard to say there is nothing due because the deed was obtained by fraud? Unless some arbitrary line is to be drawn, the right of the Master, under such a reference, to enquire into the validity of the deed would, according to the doctrine of the Court below, be co-extensive with that of the Court at the hearing. We know of no authority for any such delegation of the functions of the Court to the Master."

The plaintiff claims to be allowed a loan of \$975, being a part renewal of a loan of \$1,000 secured on the lands in question, and other lands mentioned in a receipt dated the 29th of January, 1875, and which concludes thus, "All of which securities are deposited as collateral security for the payment of a promissory note dated this day, made by the said T. D. Ledyard, payable three months after date to the order of T. D. Ledyard, at the Royal Canadian Bank, in Toronto, for the sum of one thousand dollars; and if said note is not paid at maturity it shall bear interest at the rate of two per cent. per month until paid."

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WILEY V. LEDYARD.

[Master's Office

The original note for \$1,000 mentioned in the receipt was taken up by the defendant by a part payment in cash and by a renewal note for \$975. The defendant contends that by this means the original note was paid, and that the plaintiff has now no right to hold the securities for the renewal note. It is true the original paper with the promise to pay the \$1,000 thereon is not in the plaintiff's possession, but *the debt*, or the unpaid portion of it, represented by the renewal note of \$975, and for the repayment of which debt the securities were given, has not been paid. Had the present contention of the defendant been the actual agreement between the parties he should have demanded a re-assignment of the securities at the time of the part payment and renewal on the 6th October, 1875; but he made no such demand, and has allowed them to be held up to this time, which circumstances may reasonably be assumed to negative his present contention. Besides the case of *Brownlee v. Cunningham*, 13 Gr. 586, is decisive on this point. In dealing with a similar contention, Mowat, V.C., said: "I am satisfied if I were so to hold I would be defeating instead of giving effect to the original intention of the parties; and that I shall be carrying out the intention of the original transaction and correctly construing the whole evidence by holding that the mortgage was given to secure the indemnification of the mortgagees, and each of them, in respect, not merely of the first note, but also of any subsequent transaction with the mortgagor growing out of it, whether in the shape of renewals, new notes, or otherwise. The parties have acted throughout as if this was the transaction, and I see no reason why I should not give that effect to the mortgage."

Another claim made by the plaintiff is for a cheque drawn by the defendant on the Canadian Bank of Commerce for \$283.85 dated the 10th November, 1875, and still unpaid. This is by an agreement which I hold to be binding on the defendant, also covered by the securities held by the plaintiff. The defendant contends that as the remedy for this debt is barred by the Statute of Limitations, the collaterals cannot be held for it. I find the law to be thus stated in *Banning on Limitations*, p. 16: "The fact that a creditor has collateral security for a simple contract debt will not prevent the debt from becoming barred (as respects other remedies), though he will, of course, retain his

lien upon the security." *Higgins v. Scott*, 2 B. & Ad. 413, is referred to as the authority for this—where it was held that though the remedy of an attorney on his bill of costs was barred, he had a lien on the fund recovered by the judgment, though such fund was recovered more than six years from the entry of the judgment.

The plaintiff claims to be entitled to interest at two per cent. per month on each of these sums. As to the first mentioned sum the receipt which I have quoted shews that the debt is to bear such interest until paid. As to the second sum the evidence as to the agreement to pay two per cent. a month is not satisfactory; the defendant swears that there was no agreement for subsequent interest beyond that stated in the receipt of 29th January, 1875, and letter of 6th Oct., 1875. I have come to the conclusion on the whole evidence that there was no agreement such as the plaintiff contends for, and as the parties did not embody their agreement as to interest in writing, I must hold that as to this debt the plaintiff is only entitled to interest at the rate of six per cent.

The plaintiff claims interest from the date of the respective loans, 6th October, 1875, and 10th November, 1875, up to the time for redemption. No claim for arrears of interest is specially made by the pleadings; and in order to obtain more than six years arrears the question must be raised on the pleadings: *Sinclair v. Jackson*, 17 Beav. 405.

But a more formidable difficulty meets the plaintiff's claim for such arrears. There is no covenant by the defendant to pay interest, and which covenant, when secured by deed, would have made the plaintiff a specialty creditor of the defendant in respect of such interest. A mortgagee under an ordinary mortgage is in the position of a secured creditor for six years, and of an unsecured creditor for the remainder of the ten years: that is he would have two rights of action—an action of foreclosure, and an action on the covenant for arrears of interest.

In the case of *Hodges v. Croydon Canal Company*, 15 Beav. 86, the defendants conveyed their works to a mortgagee to hold until repayment of certain moneys borrowed, and interest; but there was no covenant in the mortgage to repay either principal or interest. The Master of the Rolls held, that although the mortgagee could sue for the principal within twenty years, yet his remedy for arrears of

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interest was limited to six years. See further on this: *Brocklehurst v. Jessop*, 7 Sim. 438; *Re Stead's Mortgaged Estates*, 2. Ch. D. 713, and *Henry v. Smith*, 2 Dr. War. 381. The plaintiff therefore can only recover six years arrears of interest on each of the above loans.

The plaintiff is entitled to the amount paid by him for taxes to redeem the lands. The original mortgagee had obtained a tax deed of the property, but he was disqualified as a mortgagee to purchase it for his own benefit: *Scholfeld v. Dickinson*, 10 Gr. 326; *Smart v. Cottle*, 10 Gr. 59; *Kelly v. Macklem*, 14 Gr. 29; but the money paid by the mortgagee to redeem the lands from such taxes is a lien on the land, and the mortgagee has a right to claim the same as a just allowance, with interest at six per cent. from the date of payment.

The plaintiff also claims to, be allowed the amount paid by Barrett, the trustee for mortgagee company on a judgment against him for calls on thirty shares of the Electric and Hardware Company assigned by the defendant, Ledyard, to Barrett as collateral security for the original loan. When the stock in this company was assigned to Barrett sixty per cent. of it had been paid up, but subsequent calls were made on which Barrett was sued and judgment obtained against him about 4th April, 1882. Barrett paid this judgment, and the plaintiff now claims to add this to his debt as a lien on the lands.

There is no case made in the pleadings, for this claim, and the plaintiff has not yet obtained any assignment of the stock or of the judgment from Barrett, and Barrett is no party to this suit. The plaintiff's counsel, however, states that he can procure a formal assignment of the stock and judgment from Barrett.

Apart from other substantial reasons which it is unnecessary to refer to at length, I think I am precluded by the terms of the order of reference from allowing this to the plaintiff as "an amount due to the plaintiff in respect of the loans to the defendant, Thomas D. Ledyard," or as an amount for which the plaintiff is entitled to a *lien on the lands and premises* in question.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

### COURT OF APPEAL.

[March 4.

#### DOBELL V. ONTARIO BANK.

##### *Sale of Timber.*

The judgment of the Court below was reversed on the ground that the appellants (the bank) were not bound by the contract for sale of the deals between R. and the plaintiffs.

*S. H. Blake*, Q.C., and *W. H. Walker*, for applicants.

*Robinson*, Q.C., for respondents.

[March 4.

#### VANSICKLE V. VANSICKLE.

##### *Will, Construction of.*

The judgment of *FERGUSON*, J. was reversed. Per *SPRAGGE*, C.J.O., and *MORRISON*, J.A., the judgment on the construction of the will was right. But the evidence established the fact that the testator was a trustee of the land in question for the defendant claiming as devisee.

*Oslor*, Q.C., and *Smyth* (Brantford), for appeal.

*Robertson*, Q.C., and *Robertson*, contra.

[March 4.

#### BRAYLEY V. ELLIS.

##### *Chattel mortgage—Preference.*

R. S. O. cap. 118.

On appeal from the Chancery Division (1 O. R. 119), the judges of this Court being equally divided, the appeal was dismissed with costs.

*Gibbons*, for appeal.

*W. Cassels*, contra.

Ct. Appeal.]

NOTES OF CANADIAN CASES.

[Ct. Appeal.

[March 4.

## SIEVEWRIGHT V. LEYS.

*Trustee and cestui que trust—Auction sale—Puffing.*

The judgment of PROUDFOOT, J. (1 O. R. 375.), affirmed.

*Osler, Q.C., and Black, for appeal.*

*Moss, Q.C., and Kingsford, contra.*

[March 4.

## RE JARRARD'S EXTRADITION.

*Forgery—Alteration of account books—Official books.*

The Court of Appeal affirmed the judgment of the Common Pleas Division (4 O. R. 265).

*Osler, Q.C., for appeal.*

*E. Martin, Q.C., contra.*

[March 22.

## PATTERSON V. THOMPSON.

*Distress for rent—Joint ownership of goods.*

The judgment of the Court below (46 U. C. R. 7) was reversed, as the plaintiffs had not shown that they were solely entitled to possession of the logs, the subject of distress. SPRAGGE, C. J. O., dissenting, who thought that if the logs were the joint property of the plaintiffs and one of the tenants, and had been delivered to B. for the purpose of being manufactured into lumber, they could not be distrained on; their being so on the premises had the effect of exempting them from distress; and under the circumstances there should be a reference back to the Judge which had already tried the case to find the facts. In the event of that being impracticable there should be a new trial.

*McCarthy, Q.C., for appeal.*

*Lount, Q.C., contra.*

[March 22.

## NORVELL V. CANADA SOUTHERN RAILWAY COMPANY.

*Award under Railway Act, ch. 66, C. S. C.—*

*Effect of Dominion legislation on an Ontario Corporation brought under the jurisdiction of the Dominion—Necessity of adhering strictly to the provisions of the statute in making awards.*

*Held, that the Canada Southern Railway, although brought under the jurisdiction of the*

*Dominion before proceedings had been taken for expropriation, was still subject to the Railway Act then in force in Ontario, ch. 66, C. S. C.*

*Held, also, that where the company's arbitrator had not been notified pursuant to the statute of the time and place appointed for signing awards between the company and land owners, such awards were invalid, and that, although he had notified the other arbitrators that he would not attend.*

*Crooks, Q.C., and Cattnach, for the appellants.*

*S. H. Blake, Q.C., and W. Cassels, contra.*

[March 28.

## PROCTOR V. TRIPP.

*Trustee and cestui que trust—Trustee purchasing trust estate.*

The plaintiff had become trustee for W., who subsequently sold to the plaintiff at a great under value. W. remained in possession for a number of years, and it was shown that his mental faculties had become greatly impaired by intemperance. In an action by the plaintiff to recover the land.

*Held, that he must still be considered a trustee for W., and that under the circumstances a lapse of sixteen years did not prevent W. from asserting plaintiff's fiduciary character as a defence to the action.*

*Moss, Q.C., and Clute for the appellant.*

*H. J. Scott, Q.C., and Northrop, for the respondent.*

## FAULDS V. HARPER.

*Mortgage—Statute of Limitations—Equity of redemption.*

*Held, reversing the judgment of the Court below (2 O. R. 405), that the disability clauses of the Real Property Limitation Act do not apply to actions of redemption, and therefore in this case all the mortgages were barred; but,*

*Semble, if it were otherwise the decree of BLAKE, V.C., adjudging that the titles of those tenants in common against whom the statutory period of limitation had run were barred, while the title of those against whom the time had not run were not barred, was right.*

Ct. Appeal.]

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It appeared that the mortgagees took proceedings for sale, and one H. bought under the decree, and was declared the purchaser by the report on sale. The mortgagor was in reality the purchaser, having procured H. to bid at the sale.

Per SPRAGGE, C. J. O.—The sale to the mortgagee was a fraud upon the plaintiffs, and they had not disintituled themselves to relief by delay.

Per BURTON, J. A.—An action to redeem a mortgage is not an action to recover land, within the meaning of the Real Property Limitation Act.

*Street*, Q.C., for the appellant.

*Cassels*, Q.C., for the respondent.

#### VICTORIA MUTUAL INSURANCE COMPANY V. THOMPSON.

*Mutual Insurance Company—Assessment illegal in part—Notice.*

The directors of the plaintiffs' company assessed the defendant, a policy holder, for several sums, one of which being fire insurance of certain risks was illegal.

They sent one notice to him, claiming the amount of all the assessments, including the illegal one, in one sum.

*Held*, that the plaintiffs were not entitled to recover any of the assessments.

*Robinson*, Q.C., and *A. Bruce*, for the appeal.

*J. H. Macdonald*, and *J. R. Roaf*, contra.

#### WRIGHT V. HURON.

*Member of Synod—Vested rights.*

The judgment of PROUDFOOT, J., reported 29 Gr. 341, reversed, the Court holding on appeal that there was not any contract between the parties; and that the Synod had power to vary and repeal its by-laws, and that the plaintiff must be assumed to have accepted his stipend with knowledge of those facts; and, therefore, the by-law depriving him of that amount was binding.

*S. H. Blake*, Q.C., for the appeal.

*Idington*, Q.C., contra.

#### HILLIARD V. THURSTON.

*Negligence—Fire—Steamboats.*

*Held*, affirming the judgment of PROUDFOOT, J., that a person navigating a steamboat without legal sanction is liable for loss occasioned to property in the neighbourhood, by fire communicated thereto by sparks issuing from the funnel of the steamer, without any proof of actual negligence.

*Moss*, Q.C. and *Hudspeth*, Q.C., for appeal.

*S. H. Blake*, Q.C., and *Peck*, contra.

#### O'DONOHUE V. WHITTY.

*Solicitor and client—Costs—Negligence.*

This Court affirmed the judgment of the Court below, reported 2 O. R. 424, on the grounds that the solicitors had not been guilty of such negligence as to relieve the client from liability for their costs.

*Osler*, Q.C., for appeal.

*Moss*, Q.C., contra.

#### MCDONALD V. CROMBIE.

*Preferential judgments—R. S. O. ch. 118.*

The judgment given in the Court below, as reported 2 O. R. 243, was affirmed on appeal.

*J. H. McDonald*, for the appeal.

*Thomson*, contra.

#### BADDIN V. SUTHERLAND.

*Appeal from unanimous decision of Divisional Court—Special leave—Judicature Act, sec. 34.*

On a motion under sec. 34 of the Judicature Act, from the unanimous decision of a Divisional Court, refusing a rule for a new trial where the verdict was for \$500, the Court refused leave because there was not reasonable prospect for an appeal being successful, though they thought the verdict not entirely satisfactory and that the Court below in the exercise of their discretion might with propriety have granted a new trial.

*Osler*, Q.C., for the motion.

Ct. Appeal.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

[March 28.]

HAMILTON PROVIDENT LOAN CO.  
v. DUMBLE.

*Leave to appeal—Unanimous decision of Divisional Court—O. J. A., sec. 34.*

Where a Divisional Court has probably erred upon a point of law upon which the case turned, leave to appeal under sec. 34 of the Judicature Act may properly be given, especially if other cases are depending upon the solution of the question; but where the question is one of fact upon which the Court below has exercised its judgment, an application for leave to appeal ought not to be entertained. Therefore, where the agent of the plaintiff company had made the affidavit of *bona fides* on a chattel mortgage, the learned judge at the trial left it to the jury to say whether or not the agent was aware of all the circumstances connected therewith as required by the statutes. The jury answered in the negative, whereupon a verdict was entered for the defendant for \$244, which was moved against in banc, and the Divisional Court discharged an order *nisi* to set aside the verdict on the ground that the finding of the jury was contrary to the evidence.

*Held*, that leave to appeal should not be granted.

*Aylesworth*, for the motion.

*G. H. Watson*, contra.

[March 28.]

BANK OF MONTREAL v. HAFNER.

*Mechanic's lien—Action against owner—Mortgagee.*

The plaintiffs, who were assignees of a mechanics lien, instituted proceedings against the owner and a prior mortgagee, but which action was dismissed as against the mortgagee for want of prosecution. Having established their lien as against the owners, they then commenced the present action after the lapse of thirty days from the time of filing their lien, for the purpose of having it declared that their lien took precedence over the prior mortgagee to the extent to which the work done increased the selling value of the land.

*Held*, reversing the judgment of FERGUSON, J., that the lien had ceased to exist as against the mortgagee; for, in order to enforce the lien against all parties having estates or interests in the land, they must be proceeded against after the time prescribed by the statute for filing the lien.

*Cassels*, Q.C., for appellants.

*H. J. Scott*, Q.C., for respondents.

CHANCERY DIVISION.

Ferguson, J.]

[January 12.]

RE MUSIC HALL BLOCK.

DUMBLE v. McINTOSH.

*Discharge of mortgage—Registry Acts—Dower—Insolvency.*

Application under Vendor and Purchasers' Act.

In respect of discharges of mortgage, what the Registry Act makes tantamount to a reconveyance is the certificate of discharge *and the registration of it*, not the execution of the certificate merely.

Therefore, when in 1868 R. O'N. in partnership with J. O'N. executed a mortgage on certain real property, and his wife joined to bar her dower; and the mortgage money was subsequently paid, and a discharge of the mortgage signed but not registered, and afterwards, the partnership became insolvent, and the mortgagee's executors conveyed the property to the assignee in insolvency, who had now contracted to sell to a purchaser.

*Held*, that the wife of R. O'N. could not have dower at law in the land in question; neither could she have dower out of the equitable estate because that had passed away from her husband to the assignee, and he could not now die seized of it.

In 1868 J. O'N. and R. O'N. executed a mortgage on certain lands, which was in full force and unsatisfied at the date of their insolvency. Afterward in 1879 it was declared by judgment of the Court to have been extinguished by lapse of time. Neither of the wives of J. O'N. and R. O'N. joined in this mortgage.

*Held*, nevertheless, that, in the face of the assignment in insolvency, the extinguishment

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of the mortgage did not have the effect of again vesting the estate in J. O'N. and R. O'N. so that the dower of their wives attached.

It appearing that certain lands owned by J. O'N. and R. O'N. were part of the assets of the partnership, having been purchased with partnership funds, and the rents afterwards collected and received by the partnership, and treated in all respects as partnership moneys:

*Held*, that the wives of J. O'N. and R. O'N. had no inchoate right of dower in these lands.

*Mowat, Maclellan and Downey*, vendors' solicitors.

*Dumble and Henry*, purchaser's solicitors.

Ferguson, J.]

[Feb. 28.]

# LANGTRY V. DUMOULIN.

*Constitutional law—29-30 Vict. c. 16—Evidence—Journals of Parliament.*

The Act of the late Province of Canada, 29-30 Vict. c. 16, being An Act to provide for the sale of the rectory lands of this Province is a valid Act, and not *ultra vires*. The Imp. 17-18 Vict. c. 118, s. 6 removed the restrictions upon legislation on the subject matter of 29-30 Vict. c. 16, which previously existed by force of Imp. 31 Geo. III. c. 31, s. 42, and Imp. 3-4 Vict. c. 45, s. 42. Nor does the case of *Dobie v. The Board for the Management of the Temporalities Fund of the Presbyterian Church of Canada*, L. R. 7 App. Cas. 136 apply to the case of 29-30 Vict. c. 16, so as to shew it be *ultra vires*.

Certain alleged copies of Journals of Parliament were tendered in evidence for the purpose of shewing what the Legislature must have meant by certain words in a certain Act of Parliament. It was not satisfactorily shewn that originals of which the copies tendered were said to be copies ever existed, nor was it shewn by legal evidence that the copies tendered were copies of any original. It was, however, shewn that the copies came from the Parliamentary Library at Ottawa; and most of the copies purported to have been printed by the Queen's Printer.

*Held*, that, in the absence of a statute in this country making them receivable in evidence, they were not admissible.

*Held*, on the whole case, that all the lands in question were within the description contained

in 29-30 Vict. c. 16, s. 1, and the plaintiffs were entitled to a declaration that the defendant, Dumoulin, held the said lands as trustee merely pursuant to the provisions of the said Act, and of 39 Vict. c. 109, and to an account as claimed.

*H. Cameron, Q.C.*, and *J. Maclellan, Q.C.*, for the Synod of Toronto.

*J. Bethune, Q.C.*, and *W. Barwick*, for the plaintiffs other than the Synod.

*C. Robinson, Q.C.*, *S. H. Blake, Q.C.*, *B. B. Osler, Q.C.*, and *H. D. Gamble*, for the defendant, Dumoulin.

*E. D. Armour*, for defendant, Baldwin.

*A. Hoskin, Q.C.*, for the township Rectors.

Ferguson, J.]

[March 17.]

# BURN V. BURN.

*Undue influence—Father and son—Parties—Privily—Action against executor and surviving partner—Corroborative evidence—R.S.O. c. 62, s. 10.*

On June 23rd, 1873, D. B., by will, gave the residue of his property to the plaintiff absolutely, and nominated the plaintiff to succeed to his interest in a certain joint savings bank business, known as Burn & Co. He appointed the defendant, L., executor of his will.

D. B. died April 23rd, 1874, at which time he, and the defendant W. D. B., constituted the firm of Burn & Co.

W. D. B. was the father of the plaintiff in this action. The articles of partnership was dated April 12th, 1873, and provided that the partnership should continue during the joint lives of the two partners, D. B. and W. D. B., who were to halve the profits and expenses. This was the business referred to in the will.

On Dec. 23rd, 1872, according to the allegation of W. D. B., D. B. transferred to him by way of gift \$100 shares of Dominion stock—part of the assets of the firm.

On May 6th, 1874, L. gave W. D. B. a full and general power of attorney to act for him, as executor of the will of D. B.

In the present action the plaintiffs alleged that after the death of D. B., W. D. B., with L.'s connivance, entered into an agreement with the Dominion Bank, whereby the said bank took over the partnership business, and carried the assets for the benefit of the partnership till it could be advantageously wound up, and that large portions of such assets had since been realized which had, together with the

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profits of the business and the private estate of the testator, been received by W. D. B. and converted to his own use.

The plaintiff did not come of age till July, 1879, soon after which he asked W. D. B. for a statement of the amount and payment or settlement. On Nov. 16th, 1880, according to arrangement, the plaintiff went to the office of W. D. B., his father, and was offered a document to sign, and did sign it, and received from his father a cheque for \$8,000. This purported to be a receipt of the \$8,000 in full of all claims on the estate of D. B.

The plaintiff now brought this action against W. D. B. and L., asking to have this document or receipt declared void, an account from the defendants, or one of them, of the estate of D. B., and an account of the partnership estate of the firm of Burns & Co. come to the hands of the defendants, and to have the said partnership estate wound up, and be paid the share of the profits to which he was entitled; and to have administration by the Court of the personal estate of D. B.

*Held*, that as to the alleged settlement of Nov. 16th, 1880, the plaintiff and his father, W. D. B., could not be said to have been on equal terms. The plaintiff was not in possession of such knowledge as enabled him to make a rational settlement in respect of the estate of which he was really the owner. It was clearly the duty of his father, before making any settlement with him, to give him the fullest possible information regarding his estate and his dealings with it, even if then, under the circumstances, a settlement binding on the plaintiff could have been made. There appeared, also, to have been parental influence operating on the plaintiff's mind. Therefore the document in question was not binding on the plaintiff.

W. D. B. amongst other things contended that this action was wrongfully brought against him by the plaintiff for want of privity between them; and that he, W. D. B., was liable and ready to account to L., and to him only.

*Held*, that the suit in its present shape was maintainable, for though the general rule is that persons who have possessed themselves of the property of the deceased, or are debtors to the estate generally, cannot be made parties to a suit against the executor; yet this rule is

relaxed in the case of surviving partners of the deceased, whom it is allowed to make parties with the executor in order that the plaintiff may have an account of the personal estate entire. At all events such an action may be supported in all cases where the relationship between the executors and the surviving partners is such as to present a substantial impediment in the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners, as seemed the case here; although it did not appear that there had been actual collusion between L. and W. D. B.

As corroborative evidence of the alleged transfer of 100 shares by the testator in his lifetime to him, the defendant, W. D. B., proved the transfer of the stock to him, and a re-transfer afterward on Jan. 30th, 1873, which re-transfer, he said, was to prevent the surplus of the savings bank appearing to be less, and also produced the printed statement of the savings bank of Dec. 31st, 1872, showing this stock.

*Held*, that this was not such corroborative evidence of the gift as satisfied the statute, R.S.O. c. 62, s. 10.

*Held*, on the whole case, that the plaintiff was entitled to the account asked, and that as regards the increase or profits in the dealings with the capital of the estate, these should be apportioned in accordance with the amount of such capital owned respectively by the testator and the defendant, W. D. B., and the defendant, W. D. B. should be allowed a liberal remuneration for his exertions, care, time and trouble in the management of the estate.

*Oster*, Q.C., and *T. S. Plumb*, for the plaintiff.

*C. Moss*, Q.C., for the defendant, W. D. Burns.

Boyd, C.]

[March 26.]

#### RE SHAVER.

*Will—Evidence—Error in description—Quieting Title Proceedings—Infant heir-at-law—Jurisdiction of Referee.*

A testator by his will devised as follows:—"I devise the south-west quarter of lot 5, con. 2 of Westminster, containing fifty acres more or less, to H. P. S., his heirs and assigns, in fee simple."

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NOTES OF CANADIAN CASES.

[Chan. Div.]

The evidence shewed the testator did not own the south-west quarter of the lot, but did own the south-east quarter; that he and the devisee had lived on it for many years, and that he did not own any other part of the lot except the fifty acres of the south-east quarter.

*Held*, that evidence was admissible to explain the error and cause the will to operate on the south-east quarter.

You may reject the erroneous part of the description in a will if you have enough left to identify the subject matter devised.

*Sumner v. Summers*, 18 C. L. J. 442, distinguished.

*Quære*, whether an order made by the referee of titles barring the claims of an infant heir-at-law, would have the effect of divesting the estate of the infant.

*Sanderson*, for the petitioner.

Boyd, C.]

[April 9.]

THE BRITISH CANADIAN LUMBER AND  
TIMBER CO.

45 *Vict. c. 23 (D)*—*Insolvent Co.*—*Winding up.*

Upon a petition by B., a creditor to wind up a trading company incorporated in Scotland, and carrying on business both in Ontario and Quebec under licenses issued under the General Acts in both those Provinces, it was alleged that the company had become insolvent within the meaning of 45 *Vict. c. 23, D. 1.* "By exhibiting a statement shewing its inability to meet its liabilities," *s. 9, s.-s. c;* 2. "By otherwise acknowledging its insolvency," *s.-s. d.,* and 3. (By amendment to petition) "By procuring its money, goods, chattels, lands or property to be seized, levied on or taken under, or by any process of execution, with intent to defraud, defeat or delay its creditors," *s.-s. f.*

The petition alleged that the company had arranged to get a loan of \$150,000, and that after upwards two-thirds of this loan had been advanced, their manager and solicitor, in an interview with the officials of a bank who had advanced one-third of the loan, had said that they could not carry the company on without a further advance of \$35,000.

That, at a subsequent meeting between the same parties, a valuation lately made of some of the company's timber limits was discussed,

and which valuation shewed the timber limits to be of a great deal less value than the company had believed them to be, and that in that interview the officers of the company had said that it would be a very bad thing for the shareholders.

The petitioner also alleged the solicitor for the respondent company had procured a judgment to be entered against it at the suit of another company whose agent he was, and that under the execution issued on that judgment the office furniture of the respondent company had been seized and sold.

That any remarks made by the managers as to the position of the company were based upon the assumption that the low valuation of the timber limits received was correct, but that they did not then, and do not now, believe that the same was correct. And they deny that any judgment obtained against the company was procured with intent to defraud, defeat or delay its creditors.

The question of the jurisdiction of the Court to wind up a company incorporated and having its head office and part of its assets, and transacting part of its business in a foreign country was argued at length by counsel for the petitioner and the company, as well as for a large body of creditors in the foreign country, but was not considered in the judgment.

*Held*, that in order to bring the company within *s.-s. c.* some written statement of a formal character, shewing a deliberate and intended representation of insolvency, should be made, and that none such is shewn here.

That the second statement (the report of the valuator as to the timber limits) does not appear, by the evidence, ever to have been adopted by the company or in any manner recognized or put forth as an accurate statement of values or results.

That to bring the company within *s.-s. d.*, the manner of such acknowledgment, should as a matter of pleading be specifically stated.

That the calling of a meeting to consider the question of voluntary liquidation is not at all tantamount to such an acknowledgment.

That there is no evidence to shew what the resources of the company are in the way of uncalled capital, that, even if the company could not go on in Ontario without the \$35,000 loan and failed to get it, does not involve as a

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necessary conclusion that the company is insolvent, and nothing is to be assumed in favour of the application as the petitioner must make out a clear case for the intervention of the Court.

That this Act does not put the offence mentioned in *s.-s. f.* higher than it is put under the Statute of Elizabeth (13 Eliz. c. 5), and that under that statute it is competent for a debtor in failing circumstances to prefer one creditor to another.

Although the petition was dismissed with costs the respondents costs were deducted from the petitioner's debt, and the petitioner has the right to file another petition.

*S. H. Blake, Q.C.,* and *Brough* for petitioner.  
*MacLennan, Q.C.,* for the foreign creditors.

*G. T. Blackstock* for the company.

#### PRACTICE.

Boyd, C.]

[March 31.

#### THIRD NATIONAL BANK V. QUEEN CITY REFINING COMPANY.

*Receiver of Company—Application for direction as to collection of unpaid calls.*

This was an application of a Receiver of the assets of the defendant company by petition for a reference to the master in ordinary to consider and give directions as to the collection of unpaid calls on the capital stock of the company.

*Held*, that, notwithstanding *Thomas v. Torrance*, 1 Grant's Chancery Chamber Reports 9, the practice is for a receiver to apply to the party having conduct of the cause or to a creditor to make such a motion, and that he is not justified in making the application, unless they refuse to do so.

Application granted on substitution of plaintiffs as petitioners.

*G. W. Meyer*, for Receiver

*A. H. Marsh*, for Plaintiffs.

#### CORRESPONDENCE.

##### AMERICAN LEGAL HUMOURISMS.

*To the Editor of the LAW JOURNAL:*

SIR,—As an occasional contributor, I would ask leave to say a few words concerning a legal bi-monthly, hailing from Boston and St. Louis, called the *American Law Review*. This journal claims to have, using its own words, "the largest circulation of any legal periodical in the United States." (The typical Yankee always claims to have the biggest thing of the kind in his own line, and the biggest bragger is generally recognized by the initiated as such and nothing more.) It does not content itself, however, with legal matters, and thus delivers itself about the Dominion of Canada, apropos of nothing in particular:

They are the tail end of an empire—destitute of distinction in arts, in literature, in agriculture, in manufactures, and in mechanical inventions. They turned the cold shoulder to our ancestors in the War of the Revolution; their country was the basis of an invasion to our country in the war of 1812; and they have reaped their reward for it. They have a Vice Regal Court with its dudism and low necked dresses. They have justices who would regard it as almost a contempt of court, to have an American law book read to them. There is really no hope for their young men; for every good place, etc., etc., is filled by young nincompoops imported from England, and from all the provinces, east and west, they (we presume the nincompoops) are making to the States in great numbers, etc., etc.

And so on for about a page.

There are gentlemen as well as men of general information and historical knowledge, even among those who are not *émigrés* from Canada; why, therefore, should a legal periodical which claims a high position bring discredit on the professional journalism, by employing the pen of a writer whose ignorance on some points is only exceeded by his bad taste and capacity for lying as to others.

The next issue speaks as follows:—

The Montreal *Legal News* calls our mild and temperate observations (as above) on Canadian affairs, "a strange portrait." It traverses most of our statements, and wonders where we got our information. We got it from the stories told by Canadian *émigrés*, of whom there are a good number in this country, etc. These *émigrés* are among our very best citizens.

## CORRESPONDENCE—EXAMINATION QUESTIONS.

Very probably; they were possibly too smart for our detective force, and of course flew south; "birds of a feather," etc. We have a few more that we should like to present to our cousins south of us. It may be, however, that I am taking in earnest what was meant to be simply funny. When the *Albany Law Journal* makes a joke, the average intellect can fathom and appreciate it. But as for this ponderous joker we fear the Canadian mind is unequal to the task of understanding where his jokes come in; however, I would make an effort, and if possible ascertain the true inwardness of the situation. The title-page gives a clue. The *American L. R.* and the *Southern L. R.*, seem to have come together under one cover under the former title. Can it be that our contemporary is in the condition of a boa constrictor who is in a state of repletion after swallowing a donkey or some other morsel rather too much for his digestion? (This is merely an illustration, and it is immaterial which is the snake, and which the moke.) It really must be difficult to be witty under such circumstances. We presume it is intended as a joke, when the writer says that the gentlemen who have flitted from Canada to the United States, and are there recognized as shining legal luminaries and "prominent figures in our public affairs," might possibly have become Justices of the Peace in the Dominion. The joke here intended is evidently that men only fit for the lowest position in Canada, find their level in the highest position in the United States. This is really very funny, and not to say very complimentary on the part of the writer to the native American. And this is still harder on them when the reference is grammatically, to the "nincompoops" who have been said to be making their way to the States. It is to be hoped the boa will soon digest the moke, or the moke the boa; their present state and the uncertain result is very pitiable. Even the donkey (if his gastric juices should prove to be stronger) might be able to keep the fittest survivor out of trouble. It is of course a side-splitting humourism to speak of a city of over 100,000 inhabitants (referring to the City of Toronto) as a "village." Another joke doubtless comes in where the writer says his language was both "chaste and temperate." This must I think have been before the

struggle for assimilation now going on began. I also note that this journal solicits articles for its columns (the honour of appearing therein being said to be sufficient compensation) from "men at a distance; from Englishmen; we could even endure one from a Canadian, if the general migration to the States has left any talented men in that country." This is also funny, but it would be still funnier if contributors of this kind could be found. It is nip and tuck now between the boa and the moke, but the donkey seems a "leetle ahead," and further dulcet notes may be expected.

Yours, etc.,

A. B.

[We owe an apology to our correspondent. His letter should have appeared long ago, but has been crowded out by press of other matter. However, it is good enough not to spoil by keeping.—Ed. C.L.J.]

## LAW STUDENTS' DEPARTMENT.

## EXAMINATION QUESTIONS.

*Equity.*

(Honours.)

1. Apart from statutory provision is there any, and if so, what distinction between the liability of a purchaser of land from a trustee under a will, to see to the application of the purchase money, where the trust is for payment of debts generally and his liability therefor when the trust is for payment of specified debts only?

2. A. having by separate instruments mortgaged all his real and personal property, respectively, in fee, dies intestate and without heirs or personal representatives. In whom does the equity of redemption of each respective mortgage vest?

3. The owner of a piece of land rents it for a term of years to A., and then mortgages it in fee to B., who after default in payment serves A. with notice of the mortgage, asking him to attorn, and claiming payment of the rent. The owner also serves A. with a notice alleging that the mortgage was obtained by fraud, forbidding him to attorn and claiming payment of the rent. What course would you advise B. to adopt?

## EXAMINATION QUESTIONS.

4. In the event of partial failure of the purposes for which conversion is directed, what distinction is there, with regard to the character in which the object of the conversion reverts, between the case conversion directed by will, and conversion directed by instrument *inter vivos*?

5. Real estate is by a settlement vested in trustees for the sole and separate use of a married woman, free from the control of her present or any future husband, with restraint in anticipation. Her husband dies, and she and the trustees make sale of the property, after which she marries again and has children, who, after her death, seek by action to set aside the sale as being made in contravention of the restraint in anticipation. Is the action well founded? Give reasons.

6. A man dies intestate, leaving a wife, and also leaving real estate. The wife is ignorant of the law giving her a right to dower in the land, and at the solicitation of her son, who assures her that she has no interest therein, she, for a nominal consideration, joins the son in conveying to a purchaser, who is aware of all these facts. Has she any remedy? Explain.

7. A. owns certain lands, and he has a plan thereof made, upon which a portion of the land is laid out as a public park, and the remaining lands are divided into lots abutting on the park. He exhibits the plan to B., and sells him one of these lots. A. afterwards commences to build a residence upon the portion marked as park reserve, and B. brings his action to restrain the building. Who should succeed in the action, and why?

8. Give the general rule as to the liability of trustees for the acts of their co-trustees, and distinguish between such liability in cases of private trusts and trusts of a public nature respectively. Give reasons for answer.

9. A piece of land is by will directed to be sold and the proceeds divided between A. and B. Can A. elect to take his share in land? Give reason.

10. A. purchases land from B. by parol contract, in which it is agreed that A. shall not be entitled to possession until he has paid the purchase money, but without making such payment, and without B.'s assent, he takes possession and makes permanent improvements on the land. A. afterwards refuses to complete the purchase, and B. brings action for specific performance of the contract, to which A. pleads the Statute of Fraud. Who should succeed? Give reasons.

*Harris on Criminal Law.—Broom's Common Law Books, 3 and 4.—Blackstone, Vol. I.*

(Honours.)

1. Can a person ever be convicted of larceny for stealing his own goods? If so, when?

2. A. is standing on the middle of a bridge over a river. B. at one end of the bridge points a loaded gun at A., with intent to shoot him. A., knowing B. to be his deadly enemy, and believing that B. will shoot him, and having no other way of escape, jumps into the river and is drowned. Is B. guilty of any crime, and if so, what?

3. What is the difference between a constable and a private person, in regard to the right to arrest another without a warrant, on suspicion of felony?

4. In a case of bigamy, what effect will be produced on the liability of the accused to a conviction by (a) proof that the first marriage was void on account of consanguinity, or other like cause; (b) proof that the second marriage would have been void for a similar reason?

5. What is the true test to determine whether, in any particular case, an acquittal on a prior indictment is a bar to a subsequent indictment under the plea of *autrefois acquit*?

6. State whether or not the following offences committed in the night will or will not constitute *burglary*: (a) The thief gains admission through the outer door being open, and then breaks open the door of a room for the purpose of plundering. (b) The thief gains admission by raising a window already partly open, and plunders the house without breaking any inner door. (c) The thief is a servant who is lawfully in the house, but breaks the door of a room in order to steal. (d) A servant lawfully in the house, breaks open the door of a sideboard to steal the plate out of it.

7. Two persons agree to commit suicide together, one escapes, and the other dies. Is the former guilty of any offence in respect of the death of the latter, and if so, what?

8. A. is in actual possession of a lot of land to which he has no right or title. B., the lawful owner, enters upon the lot, without force, but in assertion of his title. Is either A. or B. a trespasser, and if so, which of them? Give reasons.

9. Explain briefly the doctrine of *ratification* in reference to torts.

10. Mention and explain the nature and effect of the *civil disabilities* affecting marriage.

## EXAMINATION QUESTIONS—CONTEMPORARY JOURNALS.

*Real Property and Wills.*

• (Honours.)

1. What are the respective rights of vendor, purchaser, and insurance company, when a loss by fire occurs on property contracted to be sold, before the sale is completed, where nothing is said as to insurance in the agreement for sale?

2. A. buys the growing timber on a piece of land. Subsequently B. advances money upon mortgage of the land, which is not a sufficient security for it without the timber, and registers his mortgage without notice of A.'s purchase. A. having commenced to cut the timber, B. issues a writ and applies for an injunction to restrain the cutting. What are the respective rights of mortgagee, owner, and purchaser of timber?

3. The owner of an estate, which is partly in the County of York and partly in the County of Ontario, mortgages the same. A creditor recovers judgment against him. He has no goods. How would you obtain payment out of the lands? Explain fully.

4. A testator directs that his debts and legacies be paid out of a certain portion (describing it) of his real estate, which he devises to his executors for that purpose. Is the purchaser of the lands bound to see to the application of the purchase money? Explain fully.

5. A. is in possession of land as tenant at will. The owner devises it to A. for life, remainder to B. in fee. A. attends at the reading of the will, but says nothing. He remains in possession as before, and nothing transpires until after the lapse of fifteen years from the date of his taking possession, when he executes a conveyance in fee simple to a purchaser. The purchaser files a petition to quiet the title, and B. is notified according to the usual practice, and appears as a contestant. Who should succeed? Why?

6. A. and B. verbally agree to buy land, and to share equally the profits gained by a re-sale. The conveyance is taken to A., and the land is sold at a profit, whereupon A. refuses to account to B. for his share, on the ground that the agreement should have been in writing. Discuss the rights of the parties.

7. Where no will is found at the death of a person who is known to have made a will, what is the presumption? How may it be rebutted?

8. Where it is shown that a will had been made by a testator and never revoked, but it cannot be found at his death, how can probate be obtained? State the nature and quantity of evidence to be adduced.

9. What is the effect of a condition of sale which reads that "the vendor will not be bound to produce any documents not in his possession?"

10. A purchaser's solicitor pays the purchase money to the vendor's solicitor, and obtains a conveyance in statutory form but without the receipt for the purchase money which is usually found in the margin of the statutory forms. The purchaser mortgages the land, and both deed and mortgage are duly registered. The vendor then claims a lien on the land for the purchase money, and it appears that he had never received it from the solicitor who acted for him in the sale. What are the respective rights of all parties? Discuss fully.

## ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

University representation.—*Law Magazine*, Nov., 1883.

French and English criminal procedure.—*Ib.*

The future of the legal profession.—*American Law Review*, Sept., October, 1883.

The Common Law and Statutory right of woman to office.—*Ib.*

Criminal law—Former jeopardy.—*Ib.*

Of the enforcement of debts contracted and liabilities incurred by Receivers of Railroads.—*Ib.*

Constructive notice, its nature and limitations.—*Ib.*

Burden of proof in criminal prosecutions.—*Ib.*

Criminal law—void sentences (Pretended judgment—No jurisdiction—No officer-at-Law—No authority to impose).—*Criminal Law Magazine*, Nov., 1883.

Presumption and the burden of proof.—*Ib.*

Nolle Prosequi.—*Ib.*, January.

Irregularity in punishment.—*Ib.*, (from *Nineteenth Century*.)

Noise and vibration as elements of nuisance.—*American Law Review*, Oct., 1883.

The Remedies for the collection of judgments against debtors who are residents or property holders in another State or within the British Dominion.—*Ib.*, Nov., 1883.

Some points of comparison between English and American Legislation as to married Women's property.

Marginal notes and head-lines of statutes.—*Irish Law Times*, Oct. 13th, 1883.

Preamble to Statutes.—*Ib.*, Dec. 15th., 1883.

Legacies given in a particular capacity.—*Ib.*, Oct. 27th.

The privilege of Counsel and Solicitors acting as advocates.—*Ib.*, Dec. 8th.

Interpretation of common words and phrases, from *Albany Law Journal*.

Move—Remove—Wheat—Vacant—Loading—Conceal—Cattle—guards—Threats—Trinkets—Manufactured Silk—Glass—Damages by the elements—Voluntary—Walking or being.—*Ib.*, Oct. 27th.

Presence—Domicile—Residence—Clerk—Track—Absolutely necessary—Manufacturer—Confectionery—House—Family—Exclusive—Uninterrupted and Continuous.—*Ib.*, Nov. 10th.

Public-bar—Store—Manufacture—Operation of Railway—Additions—Good health—Open account—Olographic will—Tool—Between sundown and sunrise.—*Ib.*, Nov. 17th.

Apparatus and appendages—Bucket-shop—Device—Good faith—operation of Railway—Tools—Box.—*Ib.*, Dec. 1st.

Lost—Mistaken—Encroachment, obstruction—Ceased—Necessaries—Literary—Either—25th *Ib.*

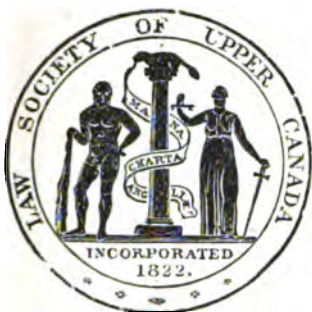
The presumption of continuance.—*Ib.*, Oct. 27th.

The presumption of identity.—*Ib.*, Nov. 3.

Devises for life with power of disposal.—*Ib.*, Nov. 3.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

HILARY TERM, 47 Vict., 1884.

During this term the following gentlemen were called to the bar, namely:—

Messrs. James Bicknell, gold medallist and with honours; George Walker Marsh; Donald Cliff Ross, John Young Cruikshank, Edward James Hearn, Wilmott Churchill Livingston, Robert Walter Witherspoon, George Frederick Cairns, Francis Stewart Wallbridge, Moses McFadden, Frederick Augustus Munson, Daniel Urquhart, Edward Guss Porter, James Burdett, Alexander Monro Grier, Edmund Campion, John James Mac-laren. The last three being under Rules in special Cases.

And the following gentlemen were admitted into the Society as Students-at-Law, namely:—

Matriculants — John Frederick Gregory, William Edward Kelly, William Wesley Dingman, John Hind Hegler.

Junior Class — Michael H. Ludwig, Franklin Smoke, John B. McColl, Robert Wilson Gladstone Dalton, James Joseph McPhillips, Frederick Rohleder, Patrick Kernan Halpin, John Wesley Coe.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- 1884 and 1885. { Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361. .  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.  
1885. { Xenophon, Anabasis. B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## OR NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somervilles Physical Geography.

## FIRST INTERMEDIATE.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

## FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

## FOR CALL.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchor, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## FEES.

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees.....	40 00
Solicitor's Examination Fee.....	60 00
Barrister's " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions.....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission.....	1 00
Fee for other Certificates.....	1 00

*Copies of Rules can be obtained from Messrs. Rowse & Hutchison.*

# Canada Law Journal.

VOL. XX.

MAY 1, 1884.

No. 9.

## DIARY FOR MAY.

1. Thur....Prince Arthur born, 1830.
2. Fri.....J. A. Boyd appointed Chancellor, 1881.
3. Sun.....3rd Sunday after Easter. Napoleon died, 1821.
6. Tues....Sittings of Supreme Court of Canada—First Intermediate Examinations.
8. Thur....Second Intermediate Examinations.
11. Sun.....4th Sunday after Easter.
13. Court Appeal Sittings begin County Court Sittings (York) Solicitors' Examination.
14. Wed....Barristers' Examination.

## TORONTO, MAY 1, 1884.

THE new regulations of March 29th, 1884, making certain amendments in the tariff, will be found in another column.

By way of experiment, to see if it will be of sufficient interest to our readers, or be by them appreciated, we publish the letter of a correspondent in England, under the heading "Our English Letter." Whether it is to become a permanency remains to be seen.

THE Statutes of New Zealand for three or four years past have been recently placed in the library at Osgoode Hall; they are handsome volumes, remarkable for the excellence of the typography, paper and binding, and certainly in all these respects cast in the shade the statutes of either the Dominion or this Province.

THE annual dinner of the Osgoode Literary and Legal Society will, this year, be held at the Walker House on the evening of May 14th. We would remind our readers that this is the only occasion which affords to all the members of the profession an opportunity of meeting one another in a social manner; and, in this connection, it would not be amiss if members of

both the senior and junior Bars would be present with the students. Tickets, we understand, may be procured up to the 16th instant from Messrs. W. J. Wallace, W. E. Raney, W. B. Lawson, and Alex. Monro Grier, members of the dinner committee.

THERE is a tradition amongst Custom House officers that an article of wearing apparel which has been worn is not subject to duty, but that one which has not been worn, though *bona fide* the property of the traveller, and intended for his own personal use, is dutiable. Mr. Astor, of New York, who deserves to be reckoned amongst the benefactors of his race, thought otherwise, and having "plenty of money and nothing to do," has been amusing himself by laying rude and sacrilegious hands on this time-honoured theory, as we learn from the *New York World*:—

When Mr. Astor returned home his baggage was seized for duties because it contained wearing apparel which had not been worn. Mr. Astor very commendably resisted the demand for payment of the alleged dues, and determined to test a construction of the law, which common sense told him was absurd, and which was a great annoyance and oppression to many persons who were not in a position to resist the exaction.

The United States Supreme Court has just rendered an interesting decision in this case. It is held that no duties can be levied on wearing apparel wholly manufactured, intended for the immediate use of a passenger or of his family accompanying him, or suitable for the season of the year approaching at the time of arrival, even though it has never been actually worn, provided that such wearing apparel does not exceed in quantity, quality and value what the passenger is in the habit of providing and keeping on hand for use.

This decision will put a stop to an inquisition

## THE SESSION—THE BAR.

by custom house inspectors which has proved exceedingly offensive to European travellers, and which it is not supposable that the law ever contemplated.

AN old friend, from whom we are always delighted to hear, writes us, from Ottawa, as to the work of the Session. There has not been much that is of interest to lawyers; what there is, we may refer to hereafter. At present, we are concerned to give our readers a sugar plum to relieve the dry solidity of their fortnightly food. After speaking of a bill of the Postmaster-General's which died unborn,

"And closed its little being without light," our old friend discourses on the bills that did see the light, but then came to an untimely end, and thus invokes the muse *in memoriam cædis innocentium*:

"Poor innocents, loved offspring of the heads  
Of legislative sires, who fondly dreamed  
They'd blossom into Acts of mighty power  
To work great marvels for our country's good,  
To make her statesmen incorruptible,  
Her laws so clear that doubtful points no more  
Should trouble puzzled judges, and her chest  
So full that deficits should be unknown.  
Fond hopes destroyed by fell Herodian sword,  
The glory and the praise they might have won,  
The well-planned good they might, perhaps,  
have done,  
And all their promised blessings to the nation  
Cut off by fate's sharp shears and—prorogation!  
They died by Parliament's remorseless rule  
And joined the martyr band of St. Ursule."

No tear, however, rises unbidden to our eye as we think of these slaughtered innocents—quite the reverse—all tears are gone, the last drop shed in bemoaning the rabbit-like productiveness of the Attorney-General of Ontario and the other fruitful mothers who have a yearly deliverance in the council chamber of our Legislative Assembly. When we think of these busy and expensive beings we are tempted to use the father's touching prayer as the olive branches came with annual regularity: "Oh, that Providence would only send them once in *two* years."

WE shall not now consider whether the charges that have recently been made, one against a solicitor for rendering fraudulent and excessive bills of costs, and the other against a Queen's Counsel of unprofessional conduct, are or are not well founded. We assume both persons to be innocent until proved guilty. The charge against the former is said by him to have been made for a contemptible political purpose, whilst the friends of the latter say that the charge against him was trumped up by way of retaliation. If there is any truth in any of these statements it is very discreditable to the parties concerned, and we trust the Law Society will make a full investigation, and will, so far as it has the power, see that justice is done in the premises.

But there is one feature of the case which is very important to the well-being and credit of the Bar, and being general in its character may properly be referred to now. It is quite inexcusable and highly improper for one barrister to make charges against another by an appeal to the public through the lay press, rather than to the Society of which they are both members, in the manner in such cases made and provided. We need not enlarge upon this; it has been alluded to before in these columns, and must now receive due attention no matter what may be the result of the present charges. Even assuming for the present that the utterances in Parliament were not justified, gentlemen of the profession should remember that two wrongs do not make a right. The gross injustice of thus publishing hearsay charges in the lay press is apparent to any one who sees the way in which the country papers twist things to suit political purposes or personal dislikes. In one now before us one of the accused persons, who we presume is waiting the proper time to make his denial or explanation, as he has as yet said nothing on the

## THE JURISDICTION OF THE MASTERS IN CHAMBERS.

subject, is held up to public scorn and contempt as one who for his misconduct will "probably have his gown stripped off his back." We are sure Mr. Macdonell never supposed that such use would be made of his hasty letter, but he must be held responsible for the natural result of his action, in case the result of the investigation should prove that the charge he has made against Mr. Blake does not result in the event alluded to.

### THE JURISDICTION OF THE MASTERS IN CHAMBERS.

A very important question was recently raised before the Chancellor upon an appeal from the order of a Local Master in the case of *Freel v. Macdonald*, affecting the jurisdiction of the Master in Chambers, but, as the case went off on another ground, no decision was given regarding it. The point taken, however, must sooner or later be discussed and receive judicial consideration, and the sooner the better.

The case of *Freel v. Macdonald* was one affecting more immediately the jurisdiction of Local Masters, in respect to applications before them in Chambers, and the question raised, to which we refer, was whether they have in any case jurisdiction to entertain applications for speedy judgment, in actions when the writ of summons has been specially indorsed, under Rule S.C. 80. Under Rule S.C. 422 the judges of the County Courts and Local Masters are empowered to exercise the same jurisdiction as the Master in Chambers in certain cases, and subject to certain restrictions. Ever since the passing of the Judicature Act the Master in Chambers has assumed to exercise jurisdiction under Rule S. C. 80 without question. There are, however, certain limitations upon his jurisdiction, and it certainly is not free from doubt whether his right to act under Rule S. C.

80 is quite as clear as has hitherto been supposed.

The Judicature Act and Rules have been construed on the principle that wherever any power or duty is conferred on "a judge," or "the Court or a judge," by the Act or Rules, the words imply that a judge in Chambers may exercise the jurisdiction, and that whatever a judge in Chambers may do, may also be done by the Master in Chambers, unless the contrary is expressed.

Under this canon of construction no doubt many matters have been transacted by the Master in Chambers to the relief of the judges, and to the satisfaction of suitors and the profession. At the same time there is a doubt, and a grave doubt, how far it is a correct mode of interpreting the Act and Rules.

If we turn to Rule S. C. 420 we find the jurisdiction of the Master in Chambers is defined. He is to have the power, authority and jurisdiction heretofore in like cases possessed in the Superior Courts respectively by the Clerk of the Crown and Pleas of the Court of Queen's Bench, and by the Referee in Chambers of the Court of Chancery, and the latter part of Rule 420 expressly excludes from his jurisdiction the matters excepted from the jurisdiction of the Clerk of the Crown and Pleas of the Queen's Bench, and the Referee in Chambers by the Reg. Gen. of Trinity Term 1870, and Chancery Order 560.

It seems, therefore, to be clear that the jurisdiction of the Master in Chambers, is the same as that formerly possessed by the Clerk of the Crown and Pleas of the Court of Queen's Bench, and the Referee in Chambers of the Court of Chancery, and no wider and no greater, but on the contrary subject to the like restrictions.

In construing Chancery Order 560 (and it will be seen that Reg. Gen. Trinity Term 1870 is in similar terms) it was held

## CHIEF JUSTICE SPRAGGE.

that the jurisdiction of the Referee was restricted to the jurisdiction exercised by a Judge in Chambers at the time that order was passed, and that where subsequent to the passing of that order any statute or order was passed giving additional powers to a Judge in Chambers, the additional powers so conferred could not be exercised by the Referee in Chambers unless he was expressly named. Thus, the power of setting aside fraudulent conveyances subsequently conferred by the Administration of Justice Act 1873 on a Judge in Chambers was held not to be exercised by the Referee, *Queen v. Smith*, 7 P. R. 429; and see *Re Nolan*, 6 P. R. 115; *Re Arnott*, 8 P. R. 39; but see *Collver v. Swazie*, 8 P. R. 421; 15 C. L. J. 137. If the principle laid down in those cases be correct, then it seems to follow that any additional power conferred upon a judge in Chambers by the Judicature, Act and Rules, cannot now be exercised by the Master in Chambers.

The power conferred by Rule S. C. 80 on "the Court or a judge" seems to us to be a power not formerly within the jurisdiction of a judge in Chambers, and therefore clearly an additional power, and therefore, upon the principle of construction adopted in *Queen v. Smith* and the other cases we have referred to, this is not a power conferred upon the Master in Chambers. In the same way, assuming that Rule S. C. 322 is intended to confer upon a Judge in Chambers power to award judgment upon admissions of fact contained in the pleadings, or in the examination of a party, etc. (a construction of the Rule, by the way entirely opposed to the practice of the Court of Chancery under General Order 270, from which that Rule is adapted), it is nevertheless an additional power, and therefore on the same principle excluded from the jurisdiction of the Master in Chambers, and yet under both of these Rules the Master in Chambers has been

accustomed to act, and if he is right in so doing, then all the judges of the County Courts, and all the Local Masters throughout the country, have a similar right to act. If they are assuming to exercise a jurisdiction they do not rightfully possess, very serious questions may arise, and the sooner the doubts which have arisen are definitely settled the better.

## CHIEF JUSTICE SPRAGGE.

Hon. John Godfrey Spragge, Chief Justice of Ontario, died on the 20th ultimo in the 78th year of his age, after a period of useful service to his country which seldom fall to the lot of the journalist to chronicle. The country will lament his loss as one who has in a long judicial career borne (as have all our judges) an unstained reputation, as well as one who has exhibited high ability as a jurist, combined with an industry worthy of all praise. We may on a future occasion refer more at length to the life and labours of this eminent judge, the last of the old regime, we can now merely copy the resolution passed at a meeting of the Bar, held after the announcement of his death, and that part of the address of Chief Justice Hagarty to the Grand Jury of York, in allusion to that event.

The resolution was in these words:—

"The members of the Bar now assembled, on behalf of themselves and their brethren throughout the Province, express their profound sorrow at the death of Chief Justice Spragge. He was permitted by a merciful Providence to continue the work of a laborious life to a ripe old age, with his physical and mental powers but little impaired, and he has passed away full of years and honours. He was a great judge and a good man, and in his public and private character was an example worthy of imitation. He occupied the judicial bench for the long period of thirty-three years successively, as vice-chancellor, chancellor and chief justice, and he discharged his high duties from first to last with a degree of zeal, uprightness, learning and ability which has rarely been surpassed in any country.

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The judgments delivered by him, and which are recorded in the reports, will be an enduring monument to his name, though found side by side with the decisions of other judges of the greatest eminence. The lamented Chief Justice also possessed, along with the higher qualities, those minor graces of character and manners which so well become the judicial office. While maintaining the dignity of the bench, he was gentle and courteous to all, and never failed to secure the esteem and respect of the bar, and his brightness and geniality in private life endeared him to all who were admitted to his intimacy."

The remarks of the Chief Justice of the Queen's Bench were to the following effect:—

"The Court will adjourn early to-day in order to pay the last tribute of respect to the distinguished judge who has just passed from amongst us. To say that his judicial career of thirty-four years has been one of unsullied purity is a tribute that may safely be paid to the memory of all departed judges of Ontario. The Province has had the benefit of his high attainments, patient labours, courteous manners and sagacious judgment, for a period almost equal to that of his greatest predecessor, Sir John Robinson, a name dear to all Canadians, and especially to the bench and bar of his much loved country.

"Chief Justice Spragge has been taken from us in the midst of his labours, dying in his harness as a good judicial soldier. For myself I have to lament the loss of a valued friend and fellow labourer for many long years, and to one toiling in the same field for nearly nine and twenty years his death speaks with a mournful significance and timely voice of warning."

## THE BRIBERY CASE.

We do not propose to discuss this political *cause celebre* at least at present, because in the first place the alleged offenders are now placed on their trial charged with high crimes and misdemeanours, and in the second place because of the difficulty of discussing any case where the strife of party politics enters as largely as it has in this case until the bitterness of the feeling engendered has died out. We can with great advantage, however, reproduce and re-

cord the weighty words of Chief Justice Hagarty in his charge to the Grand Jury at Toronto at the opening of the present Assize for the County of York. He thus spoke:—

"I understand that you will be asked to investigate a very serious and unusual charge against certain persons of conspiring to alter and frustrate the constitutional action of the Legislative Assembly of Ontario by bribing members to vote in opposition to the existing administration in questions arising in such Assembly. I am not aware of any case precisely in point having occurred either in England or in Canada. Although we would gladly accept the guidance of precedent, our regret at its absence is modified by the consideration that, perhaps for the first time in our history, it is charged that men were base enough to offer bribes to members of the Legislature, or that such members were considered base enough to be capable of accepting them. Although from the absence of direct authority the law on the subject is not as clear as we could wish, I shall charge you for the purpose of this enquiry that the law of England is sufficiently comprehensive and elastic to include within its grasp as a high misdemeanour the bribery of the representatives of the people to vote contrary to their duty or belief for the corrupt consideration of a money payment or other corrupt consideration. Parliament has in England on several occasions taken on itself the investigation of charges as to bribing its members. They have been expelled from the House; they have been proceeded against by bill or by impeachment. But no case like that before us has as yet been referred to, especially where the charge was of a general character, to induce by bribery an abandonment of one political party for the support of its opponents. Conspiracy has been often defined as an agreement together of two or more persons to do an unlawful act, or to do a lawful act by unlawful means, and the offence is complete as soon as the agreement is made. It is not necessary to prove that the parties charged met together and expressly agreed to do certain unlawful acts. Conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them. Of course the mere declaration or statement by one defendant that another defendant is engaged in an unlawful conspiracy, or is acting with him in it, is not in itself evidence against such other defendant, though both must be connected therewith by something done or said or assented to by himself. Where the charge is, a conspiracy between four

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persons you may find a true bill against all, or three or two, but not against one alone, unless others be named or stated to be unknown, and then for conspiring with such other or others. I need hardly remind you that any bill found by you must be agreed to by at least twelve of your number. I have to entreat from you a grave and impassioned consideration of the case to be laid before you. I have intentionally abstained from a perusal of the evidence on which these charges have been founded. You will hear it from the witnesses produced before you.

I need hardly tell you that it is your duty, as it is mine, to approach this investigation in a calm judicial spirit, as remote as possible from the bitter prejudice and excited party feeling in which the public has been unfortunately compelled to hear the charges discussed since the matter has become known. It is my painful and most distasteful duty in asking your impartial consideration to lament the spirit in which the whole matter has been discussed in the public prints. The truth or falsehood of the accusation seems to occupy a small place in a discussion consisting chiefly of an angry storm of charges and counter-charges between the respective champions of the accusers and the accused. Looking back on very long acquaintance with the administration of justice in this country, I have no recollection of any case brought before the court in which the violence of party warfare has shewn so shamefully to prejudice a vital question affecting the character and honour of our public men, as well as the guilt or innocence of the persons charged with attempting by base and illegal means to destroy such character and honour. I feel confident that all honest minds, not hopelessly demoralized by party spirit, must agree that no surer means can be resorted to for the debauching of public opinion and preventing the calm consideration of changes like these than the turning of a grave accusation like the present into a ferocious party struggle in which the accuser and the accused are alike assailed with virulent abuse and denunciation. A healthy public opinion, ready at all times to estimate the conduct of our public men and fellow-subjects according to the known principles of honest and fair dealing, is the surest safeguard of public morality. An unwholesome partisanship blaming and vilifying every act of an opponent's upholding and defending every delinquency of a supporter is the surest method to turn public indignation away from really evil conduct and of compounding right and wrong in a discreditable wrangle between heated political parties. I am sorry to feel it my duty thus to address you. I do so in the hope of obtaining your aid in my

endeavour to prevent the angry and bitter voices of the last few weeks' discussion from finding an echo in our courts or jury-rooms.

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A week of more than usual interest has just come to a close. On one day, at one and the same moment, four of the Courts were crowded to suffocation. In one, the Court of Appeal, was giving judgment upon application for a new trial in the case of *Bell v. Lawes*, a case, the fame of which must long ago have reached Canada; in another, Mr. Justice Hawkins was presiding over a somewhat unsavoury case of slander, known as *Page v. Harrison*; in another, Mr. Justice Grove was, with the help of a special jury, going into the merits of a patent for the manufacture of ladies' corsets; in the fourth the celebrated Mrs E. Weldon was winning the admiration of all who heard her, by the clearness of her method of argument. Taking these cases in detail, it is to be observed that the definite character of the final judgment in the Bell case, was such to commend itself to the universal approbation of the public and the legal profession. Every one agreed that the great trial had lasted far too long and had attracted far more attention than was warranted by the trumpety character of the original dispute; beyond this, it was also obvious that the judgment of the Divisional Court had been far from satisfactory. Lord Coleridge was clearly of opinion that the verdict in the original trial had been wrongly pronounced. Mr. Justice Denman failed to take any clear view of the circumstances. Mr. Justice Manisty evidently thought that the first verdict was correct. The result of this extraordinary division of opinion was that an unprecedented judgment was delivered to the effect that the rule for a new trial was to be made absolute unless the plain-

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tiff would consent to reduce his damages to £500. This was an absurd proposition, for either there had been a libel or there had not; if there had been none, then, as of course, there ought to have been a new trial; if there had been a libel, then it had been of the most venomous and reprehensible kind. Therefore the vacillating judgment of the Divisional Court was generally censured, and the firm unmistakable language of the Court of Appeal in discharging the rule was exceedingly welcome. It is a matter of which every lawyer hopes to hear no more.

Of *Page v. Harrison* the less said the better; the material of the whole trial was disgusting. But, passing on to Mrs Weldon's action against Dr. Forbes Winslow, we come to a matter of great public importance. First it is only due to her to observe that she managed her case, an extremely difficult one, with consummate skill; in cross-examination she showed great tact, and more than once inveigled the specialist in insanity into pitfalls from which he emerged in a ludicrous plight. "You know what a soul is, Dr. Winslow?" was one of her queries: "Certainly" was the rash answer, upon which he was asked to describe a soul and was left speechless. But there was a serious background to this ludicrous trial, which ended in Mrs Weldon's being defeated upon technical grounds; it served to direct the attention of the public to the terrible state of our laws of lunacy. Mrs Weldon was suspected of being insane, and her husband accordingly communicated with Dr. Winslow who, amongst other things, keeps a private asylum for rich patients to whom he charges £500 a year. This is hardly the man whom an affectionate husband would ordinarily choose as a disinterested judge of the sanity of a possible patient; nevertheless the doctor immediately called upon Mrs

Weldon, assuming a false name, and put to her a number of ridiculous questions to which it would have been impossible to give a sensible answer. But one medical certificate is not sufficient, and accordingly the father-in-law of the proprietor of the lunatic asylum also called and examined the unfortunate lady. This, in addition to a ten minutes interview with a Middlesex magistrate completed the formal preliminaries for her incarceration in a lunatic asylum. It is difficult to conceive any legal machinery which could afford better opportunities for fraud; yet, the law has been immensely improved of late years chiefly through the agency of Mr. Charles Reade, a sensational novelist, who is not the first author of works of fiction who has produced an amendment of the law.

The most important of recent enactments is the Bankruptcy Act, which has now been in operation since the 1st of January. It is quite the reverse of a success. As far as it is possible to judge, the estates of bankrupt debtors realize as little as ever, and the expenses are at least as great as they were under the Act of 1869. The surplus money finds its way into the money-bags of the Board of Trade. The result is that solicitors are naturally anxious to avoid practising in bankruptcy, seeing that they can make little or no profit by any business they undertake, and the new Act, instead of simplifying and cheapening the process, bids fair to become a nonentity. Already the number of bankruptcies has decreased by more than 1,000 compared with the corresponding period of last year, but it cannot be contended that insolvency is less frequent than it used to be. The plain fact of the matter is that no debtor will have recourse to the Court for relief, and that no creditor goes there if he can possibly help himself. Meanwhile, the presiding judge, Cave, J., is confessedly a man admirably qualified

## THE LAW OF ARBITRATIONS.

for his position. He is clear-headed, quick in dispatching business, and has a wonderful knack of finding his way through the voluminous papers which are characteristic of bankruptcy proceedings. Hitherto he has done little more than hear County Court Appeals, in the course of which he has made it clearly understood that he has a keen eye for the fraud which is the inseparable incident of many of the cases which come before his notice.

At this moment the judges are sitting in committee, to consider the desirability of remodelling the present arrangement of the circuits. This is a serious matter involving many considerations. From the point of view naturally adopted by the judges and the bar, it is manifest that concentration is a thing much to be desired. Over and over again in the secluded rural circuits does the pompous procession of two judges with their retinue move from town to town to find either a blank calendar, or else nothing but two or three cases, of which a police magistrate would dispose in half an hour. On the other hand the authorities in the threatened assize towns are loud in apprehensive complaint; nor are they without logic to support their claims. For the provincial suitors, the circuits are a great advantage and saving of expense, for the prisoners they are infinitely serviceable. As matters stand even now, it is with difficulty that a prisoner, who is generally miserably poor, can, even if he is innocent, procure the attendance of witnesses. Yet now he is tried in the very locality in which the crime was committed, while, if the advocates of concentration prevail, he may be compelled to "stand on his deliverance" far away from his native county. The way out of the difficulty seems to be provided by the proposal to establish District Criminal Courts, to which London opinion is unfavourable; nevertheless, it is safe to predict that they must come, and must

come soon. The question is one in which regard for the liberty of the subject pulls in one direction, and the pecuniary interests of solicitors doing a large agency business are on the opposite side, and it is earnestly to be hoped that the arguments of justice and humanity may prevail. Nor, perhaps, is it entirely unworthy of notice, that the circuit system is one of venerable antiquity.

*London, March, 17th.*

## SELECTIONS.

## THE LAW OF ARBITRATIONS.

THE case of *Fraser v. Ehrensperger*, reported in the March number of the *Law Journal Reports*, besides setting at rest on the authority of the Court of Appeal a question which has for twelve years rested on the authority of three judges to one, calls attention to the present chaotic state of the law of arbitrations. Much pains have of late years been taken to simplify and consolidate the procedure of the Courts, but although arbitrations have increased in number and importance of late years, nothing has been done since 1854 to improve the law on the subject. The law undoubtedly requires improvement both in form and substance. It has for its foundation certain rules of the common law which to modern notions are of a barbarous kind, supplemented by three statutes, one of them nearly two hundred years old, and the other two confusing in an almost inextricable manner two things which are totally distinct—namely, the reference of actions to arbitration and arbitrations without action. The subject commends itself to Chambers of Commerce and similar institutions, because not only is it faulty in form, but deficient in substance. Belonging, as it does, to a branch of law peculiarly important to laymen, it is not only unintelligible except to lawyers, but it has several pitfalls not visible by the light of nature. The most dangerous of these was illustrated in the case in question. It is now clear on the authority

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of the Court that without the magic words "this submission to be made a rule of Court" in the agreement to refer, either party may retire from the agreement at any moment up to the making of the award. In other words, each party agrees to refer the dispute to arbitration, so long as he and his opponent remain of the same mind—an arrangement which is very far from being businesslike.

The history of the law on the subject may be very briefly sketched. At common law an arbitrator was merely the agent of both parties, and either might withdraw his authority to the agent to make an award until the award was actually made. The remedy on the award, if made, was at common law, by action, as upon an ordinary agreement; but as actions were often by rule of Court referred to arbitration by consent, a fictitious process grew up by which it was assumed that an action had been brought upon the claim in dispute, and the action was referred to arbitration by consent by rule of Court *per saltum*. This was called making the submission or the agreement to refer the dispute a rule of Court. It was regulated by 9 Wm. III. c. 15, which Act allowed submissions agreed to be made a rule of Court to be so made on proof of the submission by affidavit, and provided for setting aside awards improperly obtained, but it did not abrogate the common law right to revoke the submission, except that such a revocation would be a contempt of Court. The 3 & 4 Wm. IV. c. 42, s. 39, provided that where the submission was agreed to be made a rule of Court it could not be revoked except by leave of the Court or a judge, which was an important step in advance. The Common Law Procedure Act, 1854, s. 17, went further still, and provided that an agreement or submission in writing might be made a rule of Court, unless there were words shewing a contrary intention. Probably the draftsman thought that by this section he had altogether got rid of the necessity of inserting the words already referred to, and that agreements which did not exclude the making a rule of Court of the submission would have all the privileges of submissions agreed to be made rules of Court, including irrevocability. If so, he was mistaken, because in the case

P. 145, it was decided by the majority of the Court of Common Pleas, consisting of Mr. Justice Willes, Mr. Justice Montague Smith, and Mr. Justice Brett, with the dissent of Chief Justice Bovill, that the right to revoke survived unless there was an agreement that the submission should be made a rule of Court. It was pointed out that the Common Law Procedure Act, 1854, although it enabled a submission to be made a rule of Court without an express agreement for the purpose, contained no provision like that in the Act of Wm. IV. that the submission should not be revocable if there was an agreement that it should be made a rule of Court. Chief Justice Bovill dissented, on the ground that section 7 of the Common Law Procedure Act, 1854, put all arbitrations on the footing of actions referred by rule of Court. This section provides that "the proceedings . . . shall be conducted in like manner as to the power of the arbitrator and the Court, etc., as upon a reference made by consent under a rule of Court or judge's order." By the Act of William IV., references of actions by rule of Court or judge's order could not be revoked; and, therefore, it appeared to Chief Justice Bovill that references by agreement followed the same rule. It not unnaturally seemed to the other judges that the words "conduct of the proceedings" were hardly strong enough to carry this meaning.

The case of *Fraser v. Ehrensperger* happened to come before Lord Justice Brett, who, as a Judge of the Common Pleas, had decided the same point in the case of *Re Meier and Rouse*. No distinction could be drawn between the two cases. A contract for the sale of a cargo of rice contained a clause by which all disputes were to be referred to the arbitration of two London brokers or their umpire; but nothing was said about making the submission a rule of Court. The cargo was not delivered, and the purchasers called on the vendors to appoint an arbitrator. This they declined; whereupon the purchasers proceeded, under section 13 of the Common Law Procedure Act, 1854, to appoint one arbitrator, as they had a right to do. This right, however, was held to be subject to the common law right to revoke, and the vendors having duly revoked, it was held

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*parte*, could not be enforced although made a rule of the Court under section 17. Lord Justice Brett upheld his previous decision, and was supported by Lord Justice Bowen. This decision cannot but be viewed with regret, and it may be questioned whether there is not enough in the Common Law Procedure Act, 1854, to shew a contrary intention. For example, section 11 allows an action to be stayed when there is an agreement to refer its subject matter, whether the submission is agreed to be made a rule of Court or not. Thus an action might be stayed, and yet an arbitration could not proceed, because the reluctant party revoked. In such a case the order staying the action would probably be rescinded, but the section evidently contemplates the stay of the action in order to enable the arbitration to proceed as if there was no reason why the arbitration should not proceed. The point is of sufficient importance to be taken to the House of Lords, although probably that tribunal would be reluctant to interfere with a branch of law analogous to practice which has existed for twelve years. The proper course would be for the Legislature to interfere, codifying the whole law on the subject, and removing this among other blots.—*Law Journal*.

## REPORTS.

### ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

#### COUNTY COURT OF THE COUNTY OF LINCOLN.

HALLADAY v. JOHNSON.

*Bastardy—Affidavit of affiliation—R. S. O. cap. 131, sec. 3—Jurisdiction of county magistrates in cities.*

A justice of the peace for a county can take an affidavit of affiliation when the mother resides in a city within such county.

[St. Catharines.

This was an action brought under R. S. O. cap. 131 against the defendant, as the father

food and other necessities furnished by the plaintiff to the child.

The mother of the child was the daughter of the plaintiff. The question whether the defendant was the father was left to the jury who found against the defendant. A question was raised at the trial as to the sufficiency of the affidavit which had been made by the mother of the child in supposed conformity with the 3rd section of the statute, and upon this point a motion was made that judgment should be entered for the defendant.

The mother of the child at the time of the seduction, which she says took place in May, 1881, resided in the city of St. Catharines, where her father also resided (she was then at service in a family in the same place), and continued to reside there until the month of August, 1881, when she went to Rochester where the child was born in January, 1882. In February, 1882, she returned to St. Catharines, and continued to live there ever since.

On the 12th April, 1882, she made the affidavit before Josiah Holmes, a J.P. for the county of Lincoln, the oath being administered in the city of St. Catharines, and the affidavit was deposited by her with the City Clerk of St. Catharines on the 13th April, 1882, and a duplicate was deposited with the Clerk of the Peace for the County of Lincoln on the 18th of May, 1882.

The objection taken to the affidavit was, that as the mother of the child resided, at the time she made the affidavit, in the city of St. Catharines, the affidavit should have been sworn before a justice of the peace for the city, and that Mr. Holmes, being only a justice of the peace named in the commission of the county of Lincoln, and not being named in any commission for the city of St. Catharines, was not a justice for the city, and consequently not competent to take the affidavit, and at all events he could not take it in the city.

SENKLER, Co. J.—The 3rd section of cap. 131 of R. S. O. is as follows:—No action shall be sustained under the two last sections, unless it is shewn upon the trial thereof that while the mother of the child was pregnant or within six months after the birth of her child she did not voluntarily make an affidavit in writing before some one of her Majesty's justices of the peace

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declaring that the person who is afterwards charged in such action is really the father of the child, nor unless she deposited such affidavit within the time aforesaid in the office of the clerk of the peace of the county, or clerk of the council of the city as the case may be.

St. Catharines was incorporated a city by a special Act of the Province of Ontario, 39 Vict. cap. 46, the incorporation taking effect on the 1st May, 1876. Before that time it had been a town. St. Catharines is one of the cities named in R. S. O. cap. 5, s. 3, and which are thereby declared for judicial purposes to be respectively united to, and form part of, the counties within the limits of which they are respectively situate, but for municipal purposes the said cities, and all towns withdrawn from the jurisdiction of the county shall not (it is thereby enacted) form part of the counties in which they are respectively situate.

Mr. Holmes was appointed a Justice of the Peace for the county of Lincoln by the last general commission issued for the county in 1863. St. Catharines was then a town. No commission has ever been issued for the city. It is said that a commission was once issued for the town, containing a few names not including Mr. Holmes. It was not produced and I have not been able to find it. It is, however, a matter of no importance as upon the erection of the town into a city the commission issued for the town ceased under the Ontario Act 36 Vict. cap. 48, s. 313, now R. S. O. cap. 71, s. 3.

No argument can be advanced on the ground of convenience, based on the cessation of authority in the town justices, as the aldermen of the new city all became justices for the city under the same Act, 36 Vict. cap. 48, sec. 306, now R. S. O. cap. 174, s. 395.

Various enactments limiting the power of county justices to act in cities and towns were referred to by Mr. McClive in his argument. I think I have examined them all, but I need not now allude to any earlier than the Ontario Act (of 1873) 36 Vict. cap. 48, s. 308. The statutes on the subject prior to this with most of the decisions upon them are enumerated and reviewed in the able and careful judgment of Mr. Dalton in *The Hamilton Election Petition*, 10 C. L. J. N. S. 170, decided on 25th March, 1874, in which he shewed that the

in force which took away the power of the county justices to act in a town or city within the boundaries of their county.

This section is now R. S. O. cap. 72, s. 6, and in *Longworth v. Dawson et al.*, 30 C. P. 375 it was held that this section and R. S. O. cap. 5, sec. 3 (already referred to in making certain cities for judicial purposes created, to and part of the counties in which they are respectively situate) contain the provision of the statute law on the subject, and that the meaning of these enactments is that county justices are, and shall be, justices over the whole area of the county, including the city, but that they shall not, when there is a police magistrate for the city, do any of the acts specified in the first named section, which are, that they shall not admit to bail or discharge a prisoner, nor adjudicate upon, nor otherwise act in any case for any town or city except at the general sessions.

The taking the affidavit in question is clearly not one of the acts specified, and if Mr. Holmes could take it at all he could clearly do it in the city.

I may also call attention to the words of this section not making any distinction between justices for the county and justices of the city; it precludes the latter from acting just as much as the former. If the effect of the prohibition to act were as general as claimed it would leave no one to do any magistrate's act in a city but the police magistrate. The object of the section was to prevent interference with the police magistrate in his official duties mentioned in it by any other justice, and was specially directed against such interference by the aldermen of cities.

As Mr. Holmes took the affidavit within the limits of the county it is not necessary to consider whether the taking such an affidavit is not one of the things which a justice of the peace could do anywhere (even out of his county), as being a mere magisterial act or an act of voluntary jurisdiction. From the authorities, and by Mr. Dalton in *The Hamilton Election Petition*, and those in Paley on Convictions, 6th Ed., p. 17-19, it would seem to be so.

The question however remains whether the statute does not require the affidavit to be made before a justice for the city.

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HALLADAY V. JOHNSON—RECENT ENGLISH PRACTICE CASES.

authority to act in the city as a justice for the city there is no valid reason why he should not take the affidavit, and it should be held sufficient unless the statute clearly indicates it must be sworn before a justice of the city only.

The original enactment on the subject of maintenance of illegitimate children is 7 W. 4, cap. 8. In it the affidavit is required to be sworn before a justice of the peace for the district, and filed in the office of the clerk of the peace for the district. No mention is made of a city. When the statutes were consolidated in 1859 the word district was changed to county or city when it first appears in the clause, and the language of the clause became the same as it now is in the Revised Statutes.

At that time the warrants of county justices required to be endorsed before they could be executed in a city, and justices of the county had no jurisdiction over offences committed in a city irrespective of the appointment of a police magistrate which now creates the prohibition. The city and the county, however, were not entirely separated even for judicial purposes; the aldermen of the city were justices for the whole county, and the general sessions of the county were held in the city although county justices could not sit in the city even to try offences committed in the county.

It seems to me that even under this state of the law it would be difficult to hold that there was no authority for a county justice to take such an affidavit in the city.

By Con. Stat. U. C. cap. 59, s. 361, every city and town separated was made a county of itself for municipal purposes, and for such judicial purposes as were therein specially provided for in the case of all cities *but for no other*.

The matters thus specially provided for in the case of all cities are those I have just mentioned, and have nothing to do with the taking of such affidavits.

I think that the object of the change was merely to extend the power to take such affidavits to justices for the city, and not to interfere with the right of county justices to take them.

However, even if under the law at that time, county magistrates were absolutely deprived

longer so, and under the present law I can see no valid reason for holding that a county justice cannot take such an affidavit when the mother of the child lives in the city. I discharge the appeal with costs.

## RECENT ENGLISH PRACTICE CASES.

### LANGEN V. TATE.

*Imp. O. 37, r. 4.—Ont. Rule, 285.*

*Evidence—Commission—Witness resident abroad.*

[C. A.—L. R. 24 Ch. D. 522.]

The Court should not grant a commission, which must involve a considerable amount of expense and trouble, unless satisfied that the evidence, to take which the commission is desired, is material on the issues raised. It should be stated on behalf of the applicant, at all events to the best of the information and belief of the deponents, the points on which the witness sought to be examined can give evidence; so as to enable the Court to judge whether the evidence can be relevant and material, and whether, therefore, justice requires that the commission asked for should be granted.

*Held*, also, in this case, that since the party applying for the commission to issue might succeed in the action and yet, nevertheless, the Court might at the hearing be satisfied that the evidence was not material, even if relevant, he should give security, to be settled by the Judge in Chambers, if the parties differed, to pay to the opposing party all such costs of and occasioned by the commission as the Judge at the trial might think he ought to pay, whatever the result of the action might be.

*Held*, further, that it is not correct to say that, in every case where the plaintiff is seeking to rectify a written contract by the parol evidence of an interested witness as to what the real agreement was, it is essential that the witness should be in Court to be examined and cross-examined.

*Berdan v. Greenwood*, L. R. 20 Ch. D. 764, n. distinguished.

### HYMAN V. HELEN.

*Imp. sec. 24, sub.-s. 3—Ont. sec. 16, sub.-s. 4.*

*Counter-claim—Vexatious action.*

[L. R. 24 Ch. D. 543.]

*Quare*, per Bowen, L. J., whether a counter-claimant before decree since the Judicature Act is not an actor to some extent, and in such a sense that it might be vexatious in him both to prosecute his counter-claim here, and to prosecute the same

## RECENT ENGLISH PRACTICE CASES.

## IN RE KNIGHT, KNIGHT V. GARDINER.

*Imp. O. 38, r. 4—Ont. Rule 304.**Affidavit—Cross-examination—Costs.*

[L. R. 24 Ch. D. 606.]

This rule applies to all proceedings whether at the trial of the action or elsewhere, and not only to the production of deponents for cross-examination before this Court at the trial of the action.

Hence, where in an administration action, one R. K., in answer to the usual advertisements, brought in a claim as heir-at-law of him whose estate was being administered, and several persons filed affidavits in support of his claim, when one of the plaintiffs gave notice to cross-examine, and R. K., the party in whose behalf the affidavits were filed, took out a summons for the appointment of a special examiner.

*Held*, that R. K. was not entitled to call upon the party requiring production of the deponents for cross-examination to pay their expenses in the first instance, according to the former practice before the Judicature Act.

## IN RE LEE AND HEMINGWAY.

*Imp. O. 55, r. 1—Ont. Rule 428.**Costs—Discretion—Special Act.*

[L. R. 24 Ch. D. 669.]

When the purchase-money of land, taken by a company under compulsory powers conferred on them by a special Act passed before the Judicature Act, has been paid into Court by reason of the disability of the person entitled to the land, the Court has, under the general discretion as to costs given to it by this Order, power to order the company to pay the costs of a petition for payment of the money out to a person absolutely entitled, even though the special Act contains no provision to that effect.

*Ex parte Mercer's Company*, L. R. 10 Ch. D. 481 followed.

## SMITH V. ARMITAGE.

*Trial—Administration action—Wilful default—Practice prior to Judicature Act.*

[L. R. 24 Ch. D. 727.]

The plaintiffs instituted an action for the administration of the will of G. A., and in their statement of claim made sundry charges of wilful default and improper conduct against the defendants.

When the action came on for trial the plaintiffs declined to go into these charges, not being prepared to do so, but asked for a decree for ordinary

administration accounts and inquiries, and that they might be at liberty in the course of taking these accounts and inquiries to proceed with the case of wilful default raised by the pleadings.

*Held*, that this could not be allowed. All the the plaintiffs could have was the ordinary administration decree, and the action should be dismissed altogether with costs so far as it went for more than the ordinary decree. It would be most unjust to keep such charges hanging over the defendants.

*Semble*, that the Court has a discretion in every case to postpone enquiring into the conduct of trustees, and to allow the enquiry to stand over in such a manner as may appear reasonable, and it is not absolutely necessary for the Court in every case to decide all the issues at once which may be brought before it at the hearing. It would be competent to the Court if it saw good reason to try the case in part and to adjourn it in part. But it would require a very strong case to make it do so; and the hearing is the proper time at which allegations of fraud should be disposed of. Except in the strongest case, and for the strongest reasons, the Court ought not to allow parties to come with such allegations with no evidence to support them, and then to ask the Court to refer questions such as these for disposal by the chief clerk, or in any other way.

*Semble*, also, that it is important in matters of practice such as this not to go back to any old practice of the Court which may have existed before the Judicature Act, but to found decisions on cases decided since the Act, because it is obvious that when the pleadings have been materially altered, the rules of the old practice may not be applicable.

## BOOTH V. TRAIL.

*Imp. O. 45, r. 2 (1875)—Ont. r. 370.*

[L. R. 12 Q. B. D. 8]

A sum already accrued due to a retired police constable, in respect of his superannuation allowance, under Imp. 11-12 Vict. c. 14, may be attached in execution.

LORD COLERIDGE, C.J.—I am of the opinion that the judgment creditor is entitled to an order attaching so much of the pension as had already accrued due at the date of the summons. . . . So much of the application as seeks to attach the pension prospectively as it falls due from time to time must be refused. It seems to be implied in the judgments in *Webb v. Stanton*, L. R. 11 Q. B. D. 518, that an order may be made attaching the payment already due. A sum in the hands of the garnishees, which they, in some way or other, can

presently be compelled to pay to the judgment debtor, seems to me to be a debt within the rule, and, therefore, attachable. It appears to me to be none the less a debt, because no particular mode of enforcing the payment is given by the statute. When there is a statutory obligation to pay money, and no other remedy is expressly given, there would be a remedy by action.

### HALL V. BRAND.

*Witness out of jurisdiction—"Trial"—Reference of action and all matters in difference—Imp. Jud. Act, 1873, s. 57—Ont. Jud. Act, s. 48.*

[L. R. 12 Q. B. D. 39.]

When an action and "all matters in difference" between the parties have been referred, by consent, to an arbitrator, no writ of subpoena will be granted under Imp. 17-18, Vict. c. 34, s. 1 (cf. C. S. C. c. 79, s. 4; R. S. O. at p. 781), for the hearing before the arbitrator is not a "trial" within the meaning of that enactment.

BRETT, M.R.—The present reference includes "all matters in difference"; the position of the parties is the same as if the writ had not been issued, and as if they agreed to submit all their disputes to the award of an arbitrator. The master had, by consent, jurisdiction to make the order of reference, and the question is whether the hearing before the arbitrator is a "trial," he having power to enter judgment in the action. I doubt whether it can be said after the reference that the action is "depending" in the High Court; but I do not decide on this ground; I decide on the ground that a hearing of all matters in difference cannot be said to be the "trial" of the cause.

### NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

### SUPREME COURT.

SEWELL V. BRITISH COLUMBIA TOWING  
COMPANY, AND THE MOODYVILLE SAW-  
MILL COMPANY.

*Contract of towage—Liability under—Sea damage—Joinder of defendants—Right of a sawmill company to let to hire a steam tug—Liability limited—25-26 Vict. (Imp.) ch. 63—31 Vict. ch. 58, sec. 12—Motion for judgment—Findings of jury not against weight of evidence—Practice.*

The B. C. T. Co. entered into contract of towage with S. to tow their ship *Thrasher* from Royal Roads to Nanaimo, there to load with coal, and when loaded to tow her back to sea. After the ship was towed to Nanaimo, under arrangement between the B. C. T. Co. and the M. S. Co., the remainder of the engagement was undertaken between the two companies, and the M. S. Co.'s tug boat, *Etta White*, and the B. C. T. Co.'s tug, *Beaver*, proceeded to tow the *Thrasher* out of Nanaimo on her way to sea, the *Etta White* being the foremost tug. Whilst thus in tow the ship was dragged on a reef, and became a complete wreck. The night of the accident was light and clear, the tugs did not steer according to the course prescribed by the charts and sailing directions; and there was on the other side of the course they were steering upwards of ten miles of open sea free from all dangers of navigation, and the ship was lost at a spot which was plainly indicated by the sailing directions, although there was evidence that the reef was unknown. The ship had no pilot, and those board were strangers to the coast.

In an action for damages for negligently towing S. and other's ship, and so causing her destruction.

*Held*—1. That as the tugs had not observed those proper and reasonable precautions in adopting and keeping the courses to be steered, which a prudent navigator would have observed, and the accident was the result of their

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omission to do so, the owners of the tugs were liable (TASCHEREAU, J., holding that the B. C. T. Co. were alone liable).

2. That under the British Columbia Judicature Act the action was maintainable in its present form by joining both companies as defendants.

3. That as there was nothing in the M. S. Co.'s charter or act of incorporation to prevent their purchasing and owning a steam tug, and as the use of such a vessel was incidental to their business, they had a perfect right to let the tug to hire for such purposes as it was for used in the present case.

4. That as the tugs in question were not registered as British ships at the time of the accident their owners were not entitled to have their liability limited under 25 and 26 Vict. (Imp.) ch. 63.

5. That the limited liability under section 12 of 31 Vict. ch. 58 (D.) does not apply to cases other than those of collision.

6. This case came before the Court below on motion for judgment under the order which governs the practice in such cases, and which is identical with English Order 40, Rule 10, of the orders of 1875. This enables the Court to give judgment, finally determining all questions in dispute although the jury may not have found on them all, but does not enable the Court to dispose of a case contrary to the finding of a jury. In case the Court consider a particular finding to be against evidence, all that can be done is to award a new trial, either generally or partially under the powers conferred by the Rule similar to the English Order 30, Rule 40.

The Supreme Court of Canada giving the judgment that the Court below ought to have given was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their so doing.

*Appeal allowed with costs.*

*Davie and McIntyre for appellants.*

*Benjamin for respondents.*

### MEGANTIC ELECTION CASE.

COTE, ALIAS FRECHETTE V. GOULET ET AL.

*Status of petitioners, proof of—What sufficient—Corrupt practice by agent with knowledge of candidate—Disqualification—Short-hand notes.*

At the trial of the petition, the returning officer, who was also the Registrar of the county of Megantic and secretary of the municipality of Inverness, was called as a witness, and, in his official capacity, produced in Court, the original list of electors for the township of Inverness and proved that the name of Lauchlin McCurdy, one of the petitioners whom he personally knew, was on the list. The original document was retained by the witness, and, as neither of the parties requested that the list should be filed, the judge made no order to that effect. The status of the other petitioners was proved in the same way.

*Held*, that there was sufficient evidence that the petitioners were persons who had a right to vote at the election to which the petition related (37 Vict. ch. 10, sec. 7 D.). The shorthand notes of the shorthand writer employed by the Court to take down the evidence, were not extended in the handwriting of the said shorthand writer, but were signed by him.

*Held*, that the said notes of evidence could not be objected to.

Before setting out on a canvassing tour, the appellant, the sitting member, placed in the hands of one B., who was not his financial agent, \$100, to be used for the purpose of the election. While visiting a part of the county with which the appellant was not much acquainted, but with which B. was well acquainted, they paid an electioneering visit to one K., a leading man in that locality. During the visit, K. indicated to B. his dissatisfaction with the candidate of his party and stated that, although he would vote for the Liberal party, he would not exert himself as much as in the former elections. Upon this, B. asked his host, "Do you want any money for your church?" and, having received a negative reply, added: "Do you want any money for anything?" K. then answered, "If you have any money to spare there is plenty of things we want it for. We are building a town hall, and we are scarce of money. B. then

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said, "Will \$25 do?" K. answered, "Whatever you like, it is nothing to me." The money was left on the table. When bidding the appellant B., good-bye, K. said: "Gentlemen, remember that this money has no influence, as far as I am concerned, with regard to the election." The appellant did not at the time, nor at any subsequent time, repudiate the act of B. This amount of \$25 was not included in any account rendered by the appellant or his financial agent, and large sums were admittedly corruptly expended in the election by the agents of the appellant.

*Held* (affirming the judgment of the Court below), that the giving of the \$25 by B. to K. was not an act of liberality or charity but a gift out of the appellant's money, with a view to influence a voter favourably to the appellant's candidature, and that although the money was not given in appellant's presence, yet it was given with his knowledge, and therefore appellant had been personally guilty of a corrupt practice.

*Appeal dismissed with costs.*

*Crepeau, Q.C., and Gormully, for appellant.*

*Irvine, Q.C., for respondent.*

#### BERTHIER ELECTION CASE.

GENEREUX ET AL. V. CUTHBERT.

*Railway Pass*—37 Vict. ch. 9, secs. 92, 66, 98, and 100—*Questions of fact in appeal.*

In appeal four charges of bribery were relied upon, three of which were dismissed in the Court below, because there was not sufficient evidence that the electors had been bribed by an agent of the candidate.

The fourth charge was known as the *Lamarche* case.

The facts were as follows:—

One L., the agent of C., the respondent, gave to certain electors employed on certain steamboats, tickets or passes over the North Shore Railroad to enable them to go without paying any fare from Montreal to Berthier, to vote at the Berthier election, the voters having accepted the free passage without any promise being exacted from, or given by them. The tickets or passes showed on their face that they had been paid for, but there was evidence that L. had received them gratuitously from one of the officers of the N. S. R'y Co.

The learned judge, who tried the case, found as a fact that the tickets had not been paid for and were given unconditionally, and therefore held it was not a corrupt act.

On appeal to the Supreme Court—

*Held*, (1) (FOURNIER and HENRY, JJ., dissenting) that, taking unconditionally and gratuitously a voter to the poll by a railway company or an individual whatever his occupation may be—or giving a voter a free pass over a railway or by boat or other conveyance, if unaccompanied by any condition or stipulations that shall affect the voter's actions in reference to the vote to be given is not prohibited by 39 Vict. ch. 9.

(2) That if a ticket, although given unconditionally to a voter by an agent of the candidate, has been paid for, then such a practice would be unlawful under section 96, and by virtue of section 98, a corrupt practice, and by virtue of section 100 the election would be void.

(3) That an Appellate Court will not reverse the decision of the judge who tried the case on a question of fact without its being made apparent that his decision was clearly wrong.

*Appeal dismissed.*

*Mercier, Q.C., for appellant.*

*Lacoste, Q.C., for respondent.*

#### CHANCERY DIVISION.

Ferguson, J.]

[March 4.]

EXCHANGE BANK V. SPRINGER.

EXCHANGE BANK V. BARNES.

*Onus*—Principal and surety—Guarantee—Negligence—Connivance.

It cannot be said that when the *onus* is upon a party to any litigation it is sufficient for him to say that he could furnish the necessary proof if he had certain papers. It is his duty to have those papers, or to have them produced, the means of causing their production being what the law deems ample. If the documents are his evidence, and they are lost, or cannot be produced, the misfortune is his, and he cannot be said to have proved his case, because he says he could prove it if he had certain papers—or rather says he cannot

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prove it without the papers, and intimates that he could if he had the papers.

In this action the plaintiffs sued the defendants on a bond given by the latter to guarantee the honesty of one M. in discharging his duties as cashier of the plaintiff's bank, charging that M. had misappropriated large sums belonging to the bank. The defence set up that, owing to certain alleged conduct and negligence on the part of the directors of the plaintiffs' bank, the plaintiffs could not recover against the defendants as sureties in the bond. This alleged conduct and negligence had regard to dealings by the plaintiffs in stocks and neglect or want of diligence of the directors in not examining the books and knowing from time to time and at all times how they were kept, and precisely what entries were being made, and what business done, so that they would have been able to detect, and would have detected any errors of M., and notified the said sureties, who, as it was, said they did not know of the alleged defalcations of M. until he had absconded to the United States.

*Held*, that to sustain this defence the sureties must show connivance between the plaintiffs and their principal.

There are many authorities, showing that negligence is not fraud, but that it may be evidence of fraud. In the same way it may be said that negligence is not connivance, but may be evidence of connivance, though the degree of negligence that would be proof of fraud or connivance may be difficult to state. The chief reliance of the surety is, and ought to be, in the honesty of the man whose honesty he has guaranteed to another, and, unless an act of connivance is affirmatively proved, a very strong case of negligence must be made out. The surety is not in a position to say to the employer: You should have so diligently watched the conduct of the man whose honesty I guaranteed to you, that no serious wrong could have been accomplished by him.

*J. Bethune, Q.C., and Patterson, for the plaintiffs.*

*S. H. Blake, Q.C., and Martin, Q.C., for the defendants.*

Full Court.]

[March 13.]

SLATER V. OLIVER.

*Fraudulent preference—Pressure.*

R. S. O. c. 118, s. 2.

Appeal from the judgment of PROUDFOOT, J., of December 14th, 1882.

This was a creditor's action to set aside a certain bill of sale of personal property as fraudulent and void, as against the creditors of the grantee.

The evidence shewed that the bill of sale was reluctantly given by the debtor, and that he only yielded after some delay, and to a continuous insistence on the part of his creditors, and that the demand of the creditor was made in good faith, with no intent but to obtain the security, which she was advised she ought to have; and though the effect of it undoubtedly was to deprive the debtor of the means of paying his other creditors; his intent in giving it was to escape his creditor's importunity; and, but for the latter's unequivocal and pressing demand, it would not have been given.

*Held*, affirming PROUDFOOT, J., the bill of sale was not void under R. S. O. c. 118, s. 2.

This section requires us to look at the intent with which the conveyance, or gift in question, was made, and if there be honest pressure on the part of the creditor, that rebuts the presumption of an intent on the debtor's part to act in fraud of the law.

*J. H. Macdonald, for the plaintiff.*

*C. Moss, Q.C., for the defendant.*

### QUEEN'S BENCH DIVISION.

RE HERRING V. NAPANEE, ETC., Ry. Co.

*Railway—Compulsory powers—Arbitration.*

A notice of appointment of arbitrator and of that of third arbitrator, in conformity with 42 Vict. c. 9, D. may be made a rule of Court under sec. 201, C. L. P. A.

A letter was addressed by the construction committee on the closing of the evidence to the owner of the land proposed to be taken, consenting to what would diminish the injury to his property, and was delivered to the railway company's arbitrator before the award was made, and given by him to the umpire.

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The advantages suggested in the letter were recited in the award, which gave compensation on the basis proposed in the first instance by the company, but the letter was not communicated to the owner of the land till award was made, which was not signed by his arbitrator. The award was held bad, notwithstanding the arbitrator's sworn testimony that they were uninfluenced by the letter in question.

Rose, J.]

## REG V. RODWELL.

*Selling liquor without license.*

Proceedings must have been taken for a first offence in order to legalize convictions with increased penalties for a second and third offence under the Liquor License Act, sec. 52.

The punishment for contravention of sec. 43 is either imprisonment with hard labour or fine; and if the fine be not paid or recovered, the punishment is imprisonment without hard labour.

*V. McKenzie, Q.C.*, for application.

*Delamere, contra.*

Rose, J.]

## REGINA V. YOUNG.

A conviction under secs. 51 and 46, of the Liquor License Act, held bad for not showing for which offence penalty imposed, as also the locality of the offence.

*V. McKenzie, Q.C.*, for application.

*Delamere, contra.*

## PRACTICE.

Proudfoot, J.]

[January.

## CLARK V. LANGLEY.

*Objections to title—Jurisdiction of Master.*

By an agreement for the sale of certain land, the vendor was to give a good marketable title of which the purchaser was to satisfy himself at his own expense and was not to call for any abstract title deeds or evidences of title other than those in vendor's possession.

Subsequently, on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title having reference to a small portion of the land, which were

answered by the plaintiff, and the reference was proceeding when the defendant applied and obtained from the Master leave to file five other objections.

On appeal, PROUDFOOT, J. held that the Master in Ordinary had no jurisdiction to grant the defendant such leave, but on a subsequent application to the Court he gave the leave required.

*Moss, Q.C.*, and *H. D. Gamble*, for the plaintiff.

*MacLennan, Q.C.*, and *Langton*, for defendant.

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[Feb. 26.

## WANSLEY V. SMALLWOOD.

*Divisional Court—Appeal to—Judgment on further directions.*

An appeal from the judgment of PROUDFOOT, J., pronounced in Court upon further directions, was set down upon the list of cases for hearing before the Divisional Court, Chancery Division.

25th February, 1884. *Richards, Q.C.*, supported the appeal.

*Walter Read, contra*, objected that the Court had no jurisdiction to entertain it.

*Richards, Q.C.*, argued that a hearing on further directions was in effect a continuation of the trial, and a judgment pronounced upon the trial could be appealed to the Divisional Court under S.C. Rule 510.

26th February, 1884,

BOYD, C.—The Judicature Act and rules make a plain and express distinction between the various modes of trial, and the trial before a referee is dealt with as a different thing from that before a Judge. (See sec. 46 and 47, and rules 277, 316 and 317). In this case the action was by consent of the parties not tried in the usual way, but the whole was referred to the Master, reserving F. D. and costs. After the Master's report was absolute it again came up in Court upon further directions before PROUDFOOT, J., who pronounced the judgment now in appeal. This is not, in my opinion, to be regarded as the trial of an action before that Judge under R. 317, or the substituted later rule, 510. If such a construction debared either party from the right of appeal, perhaps such an extreme latitude of construction as was contended for by Mr. Richards might be admitted, but there is always the right to go

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to the Court of Appeal under sec. 37 of the Act, and that, I think (having regard to the line of decision upon the question), is the only appellate forum open to the defendant. *Re Galerno*, 46 U. C. R. 379; *Trude v. Phanix*, 29 Gr. 426; *McTiernan v. Fraser*, 9 P. R. 247. In my opinion the Divisional Court has no jurisdiction to review the judgment of PROUDFOOT, J. The plaintiff should have moved as in *McTiernan v. Fraser*, and in *Trude v. Phanix*, to strike the action out of the list as improperly set down. For that reason I am disposed to strike out the case now, but without costs.

PROUDFOOT, and FERGUSON, JJ. concurred.  
*Appeal struck out without costs.*

Master in Chambers.]

[March 12.]

FRITH V. RYAN.

*Affidavit on production—Cross-examination on.*

Motion by the plaintiff *ex-parte* for leave to examine the defendant upon his affidavit on production filed.

*Held*, that Chy. G. O. 268 is superseded by Rule 283 O. J. A.

Rule 283 O. J. A. does not authorize the examination of a party upon his affidavit on production filed, and such an examination cannot be ordered, though the officer of a corporation may be examined on his affidavit on production, under Rule 226 O. J. A.

*Motion refused.*

A. J. Williams, for the motion.

Galt, J.]

[April 4.]

RE EBERTS V. BROOKE.

*Prohibition—Division Court—Action on County Court judgment.*

Application for a prohibition to the judge of the First Division Court of the County of Kent and to the plaintiff, to prohibit them from prosecuting this action, which is brought upon a County Court judgment for \$211.87, the plaintiffs abandoning the excess of their claim over \$100 and claiming \$100.

*Held*, that an inferior Court has no jurisdiction to entertain an action brought upon the judgment of a superior Court.

*Prohibition granted.*

E. D. Armour, for the application.

Aylesworth, contra.

Boyd, C.]

[April 9.]

ATTORNEY GENERAL V. GOODERHAM AND WORTS.

*Foreign commission—Names of witnesses—Professional or expert evidence.*

An action to restrain an alleged nuisance caused by the defendants' cattle byres in the city of Toronto.

An application by the defendants for the issue of commissions to certain cities in the U. S. A. to take evidence in their behalf concerning the cattle byres in those cities.

It was admitted that the only point on which witnesses in the States could be usefully examined was as to whether proper means had been taken by the defendants to minimize the objectionable accompaniments or incidents of their business. None of the persons sought to be examined were named in the application, nor was it sworn that such persons could not be ready to attend personally at the trial.

*Held*, upon this state of facts that the order for the commissioners must be refused.

As a rule the Courts discountenance professional or quasi-expert evidence from being brought before them in writing.

G. F. Blackstock, for the application.

Bathune, Q.C., contra.

Boyd, C.]

[April 15.]

McTAGGART V. TOOTHE ET AL.

*Appearance entered gratis—Lis pendens.*

The plaintiff issued a writ of summons and registered a certificate of *lis pendens* upon the lands of the defendant Toothe. The defendant, not having been promptly served with the writ, and being anxious to get rid of the suits, entered an appearance *gratis*.

The Master at London made an order in Chambers upon the application of the plaintiff striking out the appearance.

*Held*, upon appeal, that there is nothing in the Judicature Act or Rules which interferes with the well recognized practice that a defendant has a right to appear voluntarily, and to anticipate the service of actually issued process. Especially should his privilege to appear *gratis* be preserved in a case where his property is directly and prejudicially

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affected by the commencement of the action and the registration of its pendency.

Appeal allowed with costs in the cause in any event.

*Hoyles*, for the appeal.

*Rae*, contra.

Osler, J.A.]

[April 21.]

O'DONNELL V. O'DONNELL.

*Short notice of trial—Rule 455 O. J. A.—Holidays excluded in computing time.*

*Clement* moved to set aside notice of trial. The defendant was on terms to take short notice of trial, and the notice was accordingly served on Wednesday for the following Monday.

*Aylesworth*, contra.

The Master in Chambers was of opinion that the notice was irregular, as under Rule 455 O. J. A. which was held to apply to the case of a short notice of trial, Sundays and other holidays should be excluded; owing, however, to an affidavit being filed, suggesting that the defendant had agreed to take any notice and to go down to trial in any case, the application was enlarged to come before the learned judge who should take the St. Catharine's assizes, the application accordingly came before OSLER, J. A., who held the notice irregular, and set it aside without costs.

Galt, J.]

[April 21.]

MILLETTE V. LITTLE.

*Privilege of witnesses—Answers tending to criminate—Husband and wife.*

This was an action of libel in which defendants who were husband and wife were charged.

In an action of libel against a husband as the writer of libellous articles, and as editor of a newspaper in which they were printed, and his wife as owner and publisher of the newspaper, on examination, after issue joined in the action, the husband refused to answer questions as to the ownership of the newspaper on the ground that his answers might tend to expose his wife to a criminal prosecution for publication of the libels, and the wife refused to answer questions as to the authorship of the newspaper articles in question, and as to the

editing of the newspaper, on the like grounds as to her husband.

*Held*, that defendants were justified in their refusals.

## FLOTSAM AND JETSAM.

A KENTUCKY gentleman, on his death-bed, made a will, in which he bequeathed to his wife, who was *enccinte*, in case she should be delivered of a daughter, one-half of his estate, the other half to such daughter; but in case the expected heir was a son, one-third was to go to the wife and two-thirds to such son. Shortly after the testator's death the wife gave birth to twins—a boy and a girl. The question now puzzling the lawyers is: How shall the estate be divided? The wife claims one-half the estate because she had a daughter; the daughter's guardian claims one-half the estate under the will, and the guardian of the son vows he will not accept less than two-thirds of the estate. The matter is now pending in the Hickman Circuit Court. While the Judge is trying to solve this question, the lay members of the profession are trying their "prentice han". One attorney in New York city thinks it a case of "lapse;" that the "testator" died intestate, and that the law must make his will. Another, writing from Frankfort, Ky., says: "My solution of the question is, to construe the will as devising to the mother five-twelfths of the estate, to the daughter three-twelfths, and to the son four-twelfths; that is, one moiety to the mother and daughter in the proportion of one-half to each; and the other moiety to the mother and son in the proportion of one-third to the mother and two-thirds to the son." And a Hoboken attorney comes to the same conclusion. He says that he "simply bequeathed his estate twice. If he left a daughter, he gave half to the widow and half to the daughter. If he left a son, he gave one-third to the widow and two-thirds to the son. So each legacy abated fifty per cent. The widow took five-twelfths, the daughter one-fourth, and the son one-third." From Cincinnati and Toledo comes another solution, viz: "Is not the following a more equitable division all round: One-fourth to the wife, one fourth to the daughter, one-half to the son? This carries out the testator's intention to make the wife and daughter share equally, and son receive twice as much as the wife. He did not devise the estate twice, but only once upon contingencies—the ultimate events fulfilled neither contingency alone, but partook of each."

# Canada Law Journal.

VOL. XX.

MAY 15, 1884.

No. 10.

## DIARY FOR MAY.

18. Sun.....*Rogation Sunday*. D. A. Macdonald, Lieutenant-Governor Ontario, 1875.  
19. Mon.....Easter Sitting Com. Law Divisions, H. C. J. begin.  
21. Wed.....Confederation proclaimed, 1867.  
22. Thur.....*Ascension Day*. Earl Dufferin Gov.-Gen., 1872.  
24. Sat.....Queen Victoria born, 1819. Ferguson, V. C., appointed, 1881.  
25. Sun.....*Sunday after Ascension*. Princess Helena born, 1846.  
30. Fri.....Proudfoot, V. C., 1874.

TORONTO, MAY 15, 1884.

HIS Excellency has been pleased to give to four of the members of the Manitoba Bar the privilege of wearing silk gowns instead of stuff ones. We trust the selection will meet with more general approval than the last batch in Ontario. The names are: Sedley Blanchard, Frederick McKenzie, J. B. McArthur and A. C. Killam.

THE question of standard time is still exercising those who are specially interested therein, and is likely to continue to do so, at least until the International Commission shall have made its report upon a standard meridian for all nations. This commission is to meet in Washington on the 1st of October next and doubtless the conclusion it may reach will have an important bearing upon the question of local standards. It is thought that this Commission will probably recommend one standard from Atlantic to Pacific for railway purposes and that citizens should keep natural time—mean solar. Why does not some ingenious person invent a clock that would always give the absolute solar time of day?

THE Chief Justice of the Queen's Bench is now the Chief Justice of Ontario and

the head of the Court of Appeal. This appointment of Mr. Hagarty to the highest judicial position in this Province is what the public and the profession would have wished and expected. Chief Justice Wilson very properly takes the seat thus vacated, and Mr. Justice Cameron takes the Chief Justiceship of the Common Pleas. All these faithful public servants and learned judges have well earned any honour which the country had to bestow. The universal feeling is one of satisfaction that these appointments have been made.

In addition to the present vacancy in the Bench, the health of Mr. Justice Morrison is such that his friends fear he ought not for long continue the arduous duties of his position. Two men must therefore shortly be taken from the Bar; but it is difficult to say where men are to be found who, whilst having the learning and experience required, would at the same time be willing to accept a promotion which would so largely reduce their incomes. Men there are but the inducements appear to be insufficient to lure them to the Bench. Honour is pleasant but a reasonable emolument is a necessity. This necessity, the Government (and here we speak of both political parties) practically ignores. It is strange the public as well as statesmen do not realize the evils which must eventually flow from this state of things.

WE have received the new edition of Mr. J. S. Ewart's, "Manual of Costs," and welcome it most cordially. Lawyers at all events can appreciate a work of this kind, even if the *profanum vulgus* cannot.

## OSGOODE LEGAL AND LITERARY SOCIETY—THE GOWN QUESTION IN U. S. COURTS.

There are few legal publications known to us a constant reference to which will better repay the practising lawyer. In fact he will do well to make as often as possible long extracts from its pages. It appears compiled with all the care and thoroughness of its predecessor in the same department. We cannot refrain from one observation, however. For a long time past an advertisement of this work has appeared on the back of our reports in which it has been stated that "in order to ensure complete accuracy, J. H. Thom, Esq., one of the taxing officers at Osgoode Hall, has kindly undertaken to personally peruse the proof sheets." This statement still continues to appear in the advertisement referred to. Nothing, however, appears in the preface of the book as issued to show that this revision by Mr. Thom, is a fact. If it is a fact it will be useful to call attention to it; if it is not a fact it is a pity Mr. Ewart's attention is not called to the continuance of a misleading assertion.

THE dinner of the Osgoode Legal and Literary Society at the Walker House on Wednesday last was an unmixed success, and the committee of management may fairly be complimented thereon. The dinner was good, and there was not too much of it. "The rosy," as Dick Swiveller would say, was allowed to pass in moderate quantities. Distinguished guests graced the festive board, and the President discharged his hospitable duties in a manner which left nothing to be desired. More than one excellent speech was made, and Mr. Edward Blake, Mr. Goldwin Smith, Mr. B. B. Osler, Mr. Charles Moss, Mr. Huson Murray and many others, expressing much interest in the existence and the working of the society. In fact a society such as this, which not only affords the members an opportunity of practising the art of public speaking, but which also,

and this we take it is far more important, encourages and fosters *esprit de corps*, and a high tone of professional feeling must command the sympathy of all who have the highest interests of the profession at heart.

We cannot refrain here from giving our readers the benefit of a witticism which emanated in our hearing from one of the junior members of the bar at the dinner on Wednesday. One of the gentlemen present, seeing his partner immediately opposite him at table, expressed in an audible voice his gratification at finding himself opposite to "so distinguished a lawyer," to which the other replied that he had been on the point of making a similar observation. "Ah," said the third overhearing the conversation, "then each of you is the opposite of a distinguished lawyer!"

A CONTROVERSY has been raging in the legal body in the United States on the gown question. The Judges of the New York Court of Appeals have taken to wearing robes. *The Central Law Journal* has been very strong against this action, and thus comments:—

"They will be held responsible for this arrogant assumption of superiority and contempt for the people, and the day may come when they will repent that they have heeded the counsel of those men who have but used this movement to demonstrate their influence."

*The Albany Law Journal* approves of the change, and earnestly "hopes that the *Central* will forgive the Judges before the next judicial election. But the new Judges, whoever they may be, will go into the gowns all the same, unless a statute or constitutional amendment shall forbid it. To be consistent, the *Central* should never again use the phrase, 'soiling the judicial ermine.'"

*The Washington Law Reporter* has the following sensible observations:—

## PULLMAN CAR PROTECTION—ADDENDA AND CORRIGENDA.

"Too little respect for the proprieties and formalities of official position is far more injurious than too much, and certainly there can be no position which it is more important should command the very highest respect than that of Judge of the High Courts of both the states and the United States. There is no question, however much the statement of the fact may be ridiculed, that the appearance of the Supreme Court of the United States clothed in their gowns has a salutary effect upon the citizen who goes into the presence of that great tribunal."

"If gowns for the Judges will give more dignity to a court and enable it to command more respect from the public and the profession, why not have gowns?"

THE case of the *Pullman Palace Car Company v. Gardner*, reported in *Albany Law Journal*, vol. 29, p. 8, decides that a sleeping-car company is bound to use reasonable and ordinary care to protect the property of its passengers, the extent of such care being a question for the jury. In this case the watchman was absent from his post for only a few minutes, during which another man who wanted a watch stole one from under the pillow of a passenger. The company was held liable if the jury should find that the theft would not have occurred if the watchman had been at his post. In the course of his charge to the jury the judge made the following rather original observations:—

"A railroad company is under no sort of obligation to keep people from robbing us, except it would be by an onslaught, open violence on the cars. In such cases it has been held that the conductors are bound to protect, not only the persons of passengers, but also their property to a reasonable extent, as for instance, if some boy, fifteen years of age, with a wooden gun in his hand, should come in to rob a car, as I believe it is said they do out west, and the passengers should crawl under their seats, and the conductor and train hands run away, when, perhaps, if they had stood their ground they could have prevented it, the railroad company might be responsible if the jury should not find under the circumstances that the passengers ought to have defended themselves. We used to ride around in stage coaches; if robbed while in them, the company being under no obligation to carry a guard, was not responsible for the robbery, although you

might go to sleep, and they knew perfectly well you would go to sleep, or ought to suppose you would, for a man could not ride half a dozen days or nights without going to sleep; but in the case of a sleeping-car company the great convenience and inducement held out to passengers is that they will give them a comfortable night's rest. They notify them they will make them pay for it, and say to them you may go to sleep."

THE Editor of the *Canadian Law Times* has come to the rescue of his critic and has overwhelmed us with a syllogism. Being struck with the originality of our contemporary's criticism of Mr. Holmsted's latest work, in which he complained of the long list of *addenda* and *corrigenda* appended thereto, we observed that to us a long list of *addenda* and *corrigenda* is an indication of two things, industry and honesty. In the last issue of our contemporary we have our reply, and this time we are struck by the originality of his logic. He says: "we have looked through half a dozen of the later volumes of the *Canada Law Journal*, but have failed to find in them either of these things, that is *addenda* or *corrigenda*." The conclusion suggested of course is that this journal lacks industry and honesty. This is not very polite, but let us examine it a little more closely:

*Addenda* and *corrigenda* are marks of industry and honesty.

The *Canada Law Journal* has no *addenda* or *corrigenda*;

Therefore the *Canada Law Journal* has neither industry nor honesty.

What startling results this method of reasoning leads us to!

To cook his own food is a mark of a man.

The Editor of the *C. L. T.* does not cook his own food;

Therefore the Editor of the *C. L. T.* is not a man.

To be able to play several games of chess simultaneously and blindfolded is an indication of sanity.

The Editor of the *C. L. T.* cannot play several games of chess simultaneously and blindfolded;

Therefore the Editor of the *C. L. T.* is not sane.

## A HALF A HORSE CASE.

We can give our contemporary a far better explanation of the absence of *addenda* and *corrigenda* from our volumes. We take such pains to supply our readers with the latest items of interest to the profession, up to the very moment of issue that there is no room for *addenda*, while the consummate carefulness with which our large staff of proof-readers examine our pages before publication removes all possibility of *corrigenda*. Several volumes of our contemporary are on the shelves of Osgoode Hall Library, and yet we look at the close of each for *addenda* and *corrigenda* in vain. We have never been able to conceive the explanation in the case of our contemporary. Now, however, we understand the matter, our contemporary does not like *addenda* and *corrigenda*.

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A HALF A HORSE CASE.

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THE case of *Gunn v. Burgess* recently decided by the Chancellor (p. 191) was a singular one, and gives rise to serious considerations affecting the law governing the sales of chattels under execution.

The plaintiff in this case had purchased from one Garthwaite a half interest in a brood mare; Garthwaite retained possession of the animal, and while in his possession it was subsequently seized and sold under execution against Garthwaite; and the defendant became the purchaser. The action was brought to obtain the declaration of the Court that the plaintiff was entitled to a half interest in the mare, notwithstanding the sale under execution, and the action was resisted by the defendant on the ground that no bill of sale of the half interest in favour of the plaintiff was registered. The Chancellor in a very able, and clearly reasoned, judgment, came to the conclusion that no bill of sale was necessary and gave the plaintiff the relief he asked. With the correctness of this decision we do not pretend to quarrel;

at the same time the state of the law as disclosed by this decision is anything but satisfactory.

The defendant attended a sale had under process of law, at which a whole horse, not a half a one, was offered for sale. In the present case the claim of Gunn, we believe, was notified to the persons attending the sale, but the result of the case would have been the same had no notice been given. Under such circumstances in the absence of such notice, how could a purchaser know that the beast before his eyes, and which appeared so desirable an investment, was not "all there" for the purpose of sale, but only an undivided half interest.

This illustrates the danger of buying at sales under execution. In most cases the purchaser really has to go on the principle that he is "buying a pig in a poke;" and he has to run the risk of the existence of persons having interests in the property offered for sale, which no amount of ordinary care on the part of a buyer will enable him to discover.

It is bad enough when such rights crop up as against a purchaser by private sale; but when they supervene as against a purchaser under judicial process it is a grave defect in the law.

The result of the present mode of offering chattels, or land, for sale under execution is detrimental both to the execution debtor, and to the creditor, and is, besides, a possible snare for the purchaser.

When property is offered for sale under judicial process the exact interest which is saleable ought surely to be definitely and conclusively ascertained, before the sale, and the purchaser guaranteed by law in the enjoyment of what he has purchased.

In the case of *Gunn v. Burgess* the purchaser bought and paid for a whole horse, and he finds to his loss that he has only got half a one.

## RECENT ENGLISH DECISIONS.

## RECENT ENGLISH DECISIONS.

THE March number of the *Law Reports*, consist of 9 App. Cas. p. 1-186; 25 Ch. D. p. 243-471; 12 Q. B. D. p. 141-207; 9 P. D. p. 25-33.

## TRUSTEES—LIABILITIES FOR TRUST MONEY LOST THROUGH BROKERS.

The first case in the first of these is *Speight v. Gaunt*, an appeal from the decision of the Court of Appeal, reported 22 Ch. D. 727. The question was whether a trustee who, being authorized to invest the trust moneys in municipal securities, employed a broker to make such investments, and on receiving a bought-note, gave cheques for the purchase money to the broker on his request, was liable to the *cestuis que trustent*, the broker having absconded with the money, no stocks or securities having been in fact purchased by him. The House of Lords now held the trustee was not liable, the evidence showing that he had followed the usual and regular course of business adopted by ordinary business men in making such investments. The case shows, in the words of Lord Fitzgerald at p. 29, that, "although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may in the administration of the trust fund avail himself of the agency of third parties, such as bankers, brokers, and others, if he does so from a moral necessity, or in the regular course of business. If a loss to the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his has led to that result," and he adds: "looking at the trust before us and the intended investment of the trust fund, I concur in thinking that the trustee was entitled to employ a broker, and not the less entitled to do so even if he could have obtained the securities direct from the corporations without the intervention of a broker."

## DISCOVERY—INTERROGATORIES—PRIVILEGED COMMUNICATIONS.

At p. 81, is the case of *Lyell v. Kennedy*, which is entitled No. 2, to distinguish it from the case of *Lyell v. Kennedy*, reported L. R. 8 App. Cas. 217, in which the right to discovery in actions of ejectment was established. The present case also bears on the subject of discovery. In answer to certain interrogatories administered by the plaintiff, as to the defendants information, knowledge, and belief in certain matters, the defendant gave, as Lord Watson says, at p. 89, in substance the following reply: "I have no personal knowledge, but I have certain information derived from communications oral or written with my solicitor, and I have no other information or means of forming a belief." The House of Lords held that this was a sufficient answer, for that since under such circumstances the defendant's knowledge and information were protected, so also was his belief when derived solely from such communications of his solicitor. It was agreed that the object of discovery is to ascertain the state not merely of the party's consciousness, but of his conscience, and that it is permitted to search the conscience of the party by inquiring as to his information and belief from whencesoever derived. As said by Lord Watson, at p. 92: "in this case the proposition which appears to be maintained is this, that you cannot get the brief which was handed to him (the party interrogated), but that you can get the opinion which he formed." The point is mentioned as a new one. Lord Watson observes: "I think it quite impossible to separate belief in the mind of a client and litigant, which is derived from such materials as information from his agent (it may be a written memorial, it may be partly advice and council) from the information itself. I cannot see upon what principle he can be called upon to state that belief, whilst at

## RECENT ENGLISH DECISIONS.

the same time he is not under obligation to communicate or even to indicate any one of the grounds upon which it is founded." Lord Blackburn at p. 87 says the same thing in somewhat different words: "As it seems to me the plain reason and sense of the thing is that, as soon as you say that the particular premises are privileged and protected, it follows that the mere opinion and belief of the party from those premises should be privileged and protected also." And still more concisely at p. 93, Lord Bramwell says: "It appears to me upon the reason and principle of the thing, that a man ought not to be called upon to state what his belief is, founded upon information, which information is privileged, and which he is not bound to disclose."

## CHEQUE—NEGOTIABLE INSTRUMENT.

The next case, *McLean v. The Clydesdale Banking Co.*, p. 95, may be noted as an authority in the court of last resort, on a point, which is, however, spoken of by their Lordships as well established, viz., that a banker's draft or cheque is substantially a bill of exchange, attended with many, though not all, the privileges of such, and is a negotiable instrument; and consequently the holder, to whom the property in it has been transferred for value, either by delivery or by indorsation, is entitled to sue upon it, if, upon due presentation, it is not paid. A cheque, says Lord Blackburn, at p. 106, is "an unconditional order in writing addressed to a banker, requiring him to pay a sum certain in money at a fixed or determinable future time, that is to say, on presentation;" and so comes within the definition of a bill of exchange.

## B. N. A. ACT—POWER OF LOCAL LEGISLATURES.

The remaining cases which it is necessary to note from this number of appeal cases, are Canadian appeals. The first is the celebrated *Hodge v. The Queen*, which

has already been so much commented on. The head-note commences with the statement that "subjects which, in one aspect and for one purpose, fall within sec. 92 of the B. N. A. Act, may, in another aspect and for another purpose, fall within sec. 91." Their Lordships observe, at p. 130, that this is the principle which *Russell v. The Queen*, L. R. 7 App. Cas. 829, and *Citizens' Ins. Co. v. Parsons*, *Ib.* p. 96, also illustrate. In *Hodge v. The Queen*, the points decided would appear to be these. The first is expressed at p. 131, thus: "Their Lordships consider that the powers intended to be conferred by the Act in question (the Liquor License Act of 1877, R. S. O. c. 181), when properly understood, are to make regulations in the nature of police and municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such, they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted. The subjects of legislation in the Ontario Act of 1877, secs. 4 and 5, seem to come within the heads Nos. 8, 15 and 16 of sec. 92 of the B. N. A. Act." The second point decided is to be found at p. 132: "Provincial Legislatures are in no sense delegates of, or acting under, any mandate from the Imperial Parliament. When the B. N. A. Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for this Province and for provincial purposes in relation to the matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by

## RECENT ENGLISH DECISIONS.

delegation from, or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion would have had under like circumstances, to confide to a municipal institution or body of its own creation" (such as the license commissioners in the present case) "authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect." The third point decided may be briefly expressed in the word of the head-note to be that "Imprisonment" in sec. 92, sub-sec. 15, means imprisonment with or without hard labour.

## DOMINION CORPORATION—POWERS OF DOMINION PARLIAMENT.

Lastly, there is another Canadian appeal to be noted in the case of *The Colonial Building and Investment Association v. The Attorney-General of Quebec*, at p. 157. Here the Board held that the Canadian Act 37 Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the Dominion, was within the legislative competence of the Dominion Parliament. At p. 164 the judgment says: "Although the observations of this Board in the *Citizens' Insurance Co. of Canada v. Parsons*, L. R. 7 App. Cas. 96, put a hypothetical case by way of illustration only, and cannot be regarded as a decision of the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of companies." The judgment further decides that the fact that the association had hitherto thought fit to confine the exercise of its powers to one

Province, could not affect its *status* or capacity as a corporation. It says: "The company was incorporated with powers to carry on its business, consisting of various kinds, throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation." There is also a further passage in the judgment in which the *Citizens' Insurance Co. v. Parsons* is again referred to which may be noted: "It should be observed that their Lordships, in the case supposed in their judgment in the appeal of the *Citizens' Insurance Company*, with regard to corporations created by the Dominion Parliament with power to hold land being subject to the law of mortmain existing in any Province in which they sought to acquire it, had not in view the special law of any one Province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent. The object was merely to point out that a corporation could only exercise its powers subject to the law of the Province, whatever it might be, in this respect."

THE March number of the Chancery Division contains a great number of decisions on points of practice which will be noted among recent English practice cases. The first case requiring noting here is *In re Columbia Chemical Factory, Manure and Phosphate Works*, at p. 283.

## COMPANY—CONTRIBUTORIES—DIRECTORS' QUALIFICATION—ABORTIVE SHARES.

In this case a company was registered in June, 1879. B. and H. signed the memorandum of association as subscribers for one share each. By the articles B. and H. were named as original directors, and it was provided that the qualification of a director should be fifty shares, provided that this should not invalidate any

## RECENT ENGLISH DECISIONS.

acts of the first directors prior to their being so qualified. Both B. and H. accepted the office of director. B. attended two meetings of the board, and then resigned; H. remained and acted as a director until the winding up of the company, pursuant to a resolution passed on November 5th, 1879. Neither B. nor H. applied for any shares in the company, and no shares except those for which they signed the memorandum of association, were ever allotted to either of them, or treated in the books as belonging to them. The liquidator now sought to put B. and H. on the list of contributories for fifty shares each, on the ground of the stipulation in the articles as to the directors' qualification. The Court of Appeal, however, held (affirming the decision of Kay, J.) that assuming that the contract entered into by B. and H. to obtain a qualification amounted to an agreement to take fifty shares, they were entitled to a reasonable time for performing the agreement, and that under the circumstances such reasonable time had not elapsed since the commencement of the winding up of the company, and consequently they could not be held liable as contributories in respect of the fifty shares. In delivering the judgment of the Court of Appeal, Cotton, L. J., says:—"The contract of a director under such articles to acquire the necessary qualification must be to do so within a reasonable time; that is, the director must be allowed a reasonable time for performance. What is a reasonable time must depend on the circumstances of each case. Where the company is an established and going concern, the reasonable time within which the contract is to be performed may be before the alleged contributory has begun to act . . . In the present case, the company, though formally constituted, never had any business existence. No member of the public who had not signed the memorandum ever applied for, or had allotted to

him, shares in the company; the board of the company was not fully constituted, no business was ever done, and nothing was done except to vary, and complete as varied, the agreement with L." (for the purchase of whose chemical factory the company was organized), "the working of which was to constitute the business of the company. The whole thing was inchoate only. Having regard to these circumstances, and to the very short time during which the company had even a formal existence, we are of opinion that a reasonable time for completing the contract to acquire a qualification had not elapsed before the company was wound." Kay, J., in his judgment, discusses the authorities bearing on the case *seriatim*, and gives a classification of them as follows:—

The cases on this subject seem to be divisible into the following classes:—

1. Where under similar articles a director has simply accepted the office, and there it is held he is not a contributory.

2. When, after accepting, and while he is director, shares have been registered in his name, and then he is presumed to know what was done, and to have accepted such shares.

3. When the articles make the possession of the qualification of shares a condition precedent, and then it is held that the director may have been improperly appointed, and he is not a contributory.

4. There is a separate class of cases in which, by virtue of the special terms of the articles or of the company's charter, a director, on accepting the office, becomes *ipso facto* a shareholder.

5. The last class of cases (within which it is contended that this comes) is where a director has not merely accepted that office but has acted as director, and it is contended that in that case there is an implied agreement on his part with the company to take from the company the proper number of shares for his qualification."

## RECENT ENGLISH DECISIONS.

In connection with this case attention may be called to the recent decision of Ferguson, J., *In re Standard Fire Insurance Co.*, which will be found noted in this number of the JOURNAL.

## SOLICITORS' CHARGES—TAXATION—PRESSURE.

The case of *In re Lacey and Son*, at p. 301, requires a brief notice. There, a tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor's costs, gave notice in December, 1882, of his exercise of the option, and stated that he should not require an abstract of title. The time for completion was March 25th, 1883, but it was arranged for the tenant's convenience that the completion should be six weeks earlier, and that the property should be conveyed in two lots. He sent his draft conveyances for perusal before the end of December. On February 2nd, 1883, the vendor's solicitors sent in their bill of costs, comprising certain charges to which the purchaser's solicitors objected. The vendor's solicitors, however, refused to allow completion unless they were paid, and on February 14th the purchaser paid them under protest, and completed the purchases. After this he applied for taxation of the bill. The Court of Appeal, however, hold that, having regard to the dates, there was no pressure, and that there was no overcharge amounting to fraud, and that there were therefore no special circumstances to authorize taxation after payment. Cotton, L.J., says, at p. 30: "After payment special circumstances are requisite to authorize taxation, and these special circumstances must be pressure, and manifest over-charges, or over-charges so gross as to amount to fraud. It cannot be said that there are over-charges amounting to fraud, and I think that pressure is not shown."

## MORTGAGE—COVENANT—JUDGMENT—MERGER.

At p. 328 a case of *Ex parte Fewings*, *In re Sneyd*, requires notice. A mortgagor

covenanted in his mortgage that if the principal money, or any part thereof, should remain unpaid after the expiration of the time limited, he would, so long as the same sum or any part thereof should "remain unpaid," pay to the mortgagee interest for the principal sum, or for so much thereof as should for the time being "remain unpaid," at 5 per cent. per annum. After the expiration of the six months, the mortgagee recovered judgment against mortgagor on the covenant for the principal sum and interest in arrear. The Court of Appeal, overruling Bacon, C.J., held that the covenant being merged in the judgment, the mortgagee was, as from the date of the judgment, entitled only to interest on the judgment debt at the rate of 4 per cent., (the legal rate in England), and was not entitled under the covenant to interest at the rate of 5 per cent. on the principal sum. A passage from the judgment of Fry, J. at p. 355, explains the decision: "When there is a covenant for the payment of a principal sum, and a judgment has been obtained upon the covenant for that sum, it is plain that covenant is merged in the judgment, and, if there is a covenant to pay interest which is merely incidental to the covenant to pay the principal debt, that covenant also is merged in a judgment on the covenant to pay the principal debt. Of course a covenant to pay interest may be so expressed, as not to merge in a judgment of the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant, or on a judgment."

VENDOR AND PURCHASER—MISLEADING CONDITIONS OF SALE  
—MISLEADING STATEMENTS OF AUCTIONEER.

As to the next case *Heywood v. Mallalieu*, at p. 357, space only permits a note that in its specific performance of a contract for a sale of a house was refused on the ground that the conditions and particulars

## RECENT ENGLISH DECISIONS—RE BEITH, A LUNATIC.

of sale were misleading inasmuch as they merely stated that the lot was sold subject to any existing rights and easements of whatever nature, but made no specific mention of a certain existing easement of which the vendor's solicitor had notice, and, also on the ground that the auctioneer, who was informed of the easement in question, at the time of sale, on being questioned, told the audience they might dismiss the subject of the rumoured claims from their minds, as nobody would probably hear of them again, whereas the auctioneer should have more fully stated what was known to him as to the easement aforesaid.

## RAILWAY COMPANY—POWERS—NUISANCE.

Lastly, it is necessary briefly to note the decision in the case of *Truman v. London, etc., R. W. Co.*, at p. 423. There a railway company were by their Act empowered to purchase (besides the lands as to which they had compulsory powers) any lands not exceeding in the whole fifty acres, for the purpose of making additional station yards for cattle and for other purposes, and were also empowered to carry cattle (amongst other things). The company accordingly purchased a piece of land adjoining one of their stations, and used it for unloading cattle. The noise of the cattle and drovers was a nuisance to the occupiers of certain houses near the station, and they now sought an injunction to restrain the company. Mr. Justice North, in an elaborate judgment, held that as the company were not obliged by their Acts to carry cattle or to have a station for cattle, and had not shown that this was the only available place for such a station, they had no power to create a nuisance at this place; and an injunction was granted with damages.

Of the cases in the remaining number of the *Law Reports* for March, there is, with the exception of practice cases which will be noted in another place, only one case

specially calling for mention, viz., *Leigh v. Dickeson*, at p. 195 of 12 Q. B. D., in which Pollock, B. holds that one tenant in common of a house, who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution. He cites the authorities on the writ by one of two tenants in common against the other *de reparatione faciendâ*, and points out that in all the cases the ground of the claim seems to be such as to presuppose that the condition of the things to be repaired would be dangerous or useless unless the repairs in question were effected.

A. H. F. L.

## REPORTS.

## ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

## MASTER'S OFFICE, COUNTY OF ONTARIO.

## RE BEITH, A LUNATIC.

*Appointment of new member of a joint committee—Former bond superseded.*

On the appointment of a new member of a lunatic's committee the former bond is superseded, and a new joint bond of the surviving and the newly-appointed member must be furnished and filed.

[Whitby, April 3—MR. DARTNELL.]

H. B. and A. B. had been appointed a joint committee of the lunatic, and had given the usual bond as such. A. B. having died, by order of Court it was referred to the Master at Whitby to appoint I. B. in his place, "first giving security to the satisfaction of the Master." A bond of the new member of the committee, with sureties, was brought in for the approval of the Master by Loscombe & Leith, solicitors, of Bowmanville.

THE MASTER AT WHITBY.—I am of opinion that the old bond is superseded except as to acts done up to the present time. The office is a joint one, and the members of the committee are jointly liable. I therefore direct that the bond now required shall be that of both the old and the new members of the committee, with proper sureties.

## RE ANDERSON V. SMITH—RECENT ENGLISH PRACTICE CASES.

I may add that the official guardian concurs in this view.

A bond such as directed was subsequently brought in, approved of and filed.

## COUNTY COURT OF THE COUNTY OF ONTARIO.

## RE ANDERSON V. SMITH.

*Commission to take evidence under the Division Court Act.*

*Nadin v. Bassett* (25 L. R. Chy., page 21) is not an authority to prevent an examination under a commission to a foreign country, under section 100 of the Division Court Act.

[Whitby, April 5.

Application for a commission to take the evidence of the plaintiff, who formerly resided at Port Perry, but who now resides at Minneapolis, U. S. The claim was for medical services, and the interrogatories shewed that merely formal proof of the claim was contemplated.

*N. F. Paterson, Q.C.*, opposed the application, citing *Nadin v. Bassett, supra*.

DARTNELL, J. J.—Section 100 of the Division Court Act provides for the issue of such a commission as asked for, if, "in the opinion of the Judge, a saving of expense will be caused thereby." I am of this opinion, and therefore think the order should go. In the case cited a similar order for the examination of the plaintiff in New Zealand was made, but, as in that case a material question in the cause was the identity of the plaintiff himself, the order was qualified by inserting a proviso "that the depositions of the plaintiff are not to be read, if the defendant requires him to appear at the trial to be examined and cross-examined." I see in this case no reason for this qualification of the order, nor do I conceive that *Nadin v. Bassett* is any authority for refusing the order, but rather the contrary.

## RECENT ENGLISH PRACTICE CASES.

## . NADIN V. BASSETT.

*Imp. O. 37, 2. 5 (1883),—Ont. r. 485.*

*Evidence on commission—Examining a party on commission—Identity, question in dispute.*

[L. R. 25 Ch. D. 21.

In an action for redemption the defendant admitted the plaintiff's right to redeem, if he was the person he represented himself to be, but disputed

the plaintiff's identity. The plaintiff resided in New Zealand, and now applied for an order to examine himself, two other witnesses (naming them), "and others" in New Zealand in his behalf. The Court of Appeal held, under the circumstances of this case, it was proper the order should go, but only with a proviso that the depositions of the plaintiff should not be read if the defendant required him to appear at the trial to be examined and cross-examined, no case having been made that it was practically impossible for the plaintiff to attend at the trial.

Although it is true that in considering whether justice requires an examination before special examiners, a party does not stand in the same position as a mere witness, yet there is no doubt the Court has power under this rule to direct the examination of a party.

Although the Court will not direct a mere roving inquiry, and the person who comes for an order of the above kind must show there are material witnesses to be examined, yet it is not necessary that all the witnesses to be examined should be named in the order.

*Semble* (per KAY, J.), the intention of this rule is not that after an order is made under it, the discretion of the Court is taken away at the hearing of the cause. Without any special limitation in the order made in the present case, if the plaintiff and his witnesses were cross-examined in New Zealand the Court would be at liberty at the hearing of the case, if the defendant required the plaintiff and his witnesses to be produced in England, to order them to be examined and cross-examined again before the Court, and if the Court were of that opinion there is nothing to interfere with the jurisdiction of the Court to order the trial to stand over, or make any other which the justice of the case may require.

*Quare*, whether the mere addition to the order for the examination asked for, of a proviso that "this order is to be without prejudice to the right of the defendant to cross-examine the plaintiff at the trial of the action in the presence of witnesses in England, who can speak to his identity," would authorize the judge at the trial to reject the plaintiff's evidence, if he, being still out of the jurisdiction, did not appear to be cross-examined.

## IN RE BURGESS.

## BURGESS V. BOTTOMLEY.

*Rule 96.*

*Next friend of infant—Conflict of interests.*

[C. A.—L. R. 25 Ch. D. 243.

Doubts having arisen as to the proper custody of an infant, a suit was commenced in her name for

## RECENT ENGLISH PRACTICE CASES—NOTES OF CANADIAN CASES.

[Sup. Ct.]

the administration of her father's estate. A next friend was appointed who was a friend of the defendant's, the executor's and trustees of the will, and guardians of the infants, and accepted the office at their request, and on an indemnity from their father. The solicitors on the record for the plaintiff were the solicitors of the executors. On an application in the name of the infant by M., the husband of her paternal aunt, as next friend *pro hac vice*, to remove the next friend and substitute M.

*Held*, that although nothing was alleged against the character, circumstances or conduct of the next friend, his connection with the executors made him an improper person to act as next friend, and that he ought to be removed and M. substituted.

Per COTTON, L. J.—It is a settled principle that a party ought not to be both plaintiff and defendant. Mr. O. (the next friend), no doubt is a respectable gentleman who intends to do what is right, but he is put in by the trustees and executors. On being put in by them he gets an indemnity from their father. I do not think that is itself material, but it shows how completely he is connected with them, and he leaves the matter entirely with his solicitor who is acting with his executors. There ought not to be either in form or substance the same person both plaintiff and defendant; there ought to be some person acting independently as plaintiff against the defendant.

## IN RE PICKERING.

## PICKERING V. PICKERING.

*Imp. O. 31, r. 11 (1875)—Rule 221.*

*Production—Sealing up entries—Partnership books.*

[L. R. 25 Ch. D. 247.]

The defendant and W. P. were partners. W. P. died and appointed the defendant his executor. In an action by a person interested under W. P.'s will against the defendant a decree was made for administration of W. P.'s estate, and for taking accounts of the partnership as between the defendant, as surviving partner, and W. P.'s estate. An order having been made for the production of the partnership books by the defendant, he claimed to seal up such entries as related to his own private affairs.

*Held*, that, inasmuch as the plaintiff and defendant were both interested in the partnership property, the defendant was not entitled to the ordinary power to seal up such entries as he might swear to be irrelevant to the matter at issue in the action, but only to seal up entries which related to

certain specified private matters mentioned in the order.

## IN RE Inderwick.

*Solicitor—Order for delivery and taxation—R. S. O. c. 140, s. 40.*

[C. A.—L. R. 25 Ch. D. 279.]

Where an agreement has been made for the remuneration of a solicitor, and the solicitor alleges that the remuneration was for non-professional work, the person chargeable cannot obtain the common *ex parte* order for the delivery and taxation of the bill of costs.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

## SUPREME COURT.

Ontario.]

## GRASETT V. CARTER.

*Boundary line—Equitable estoppel—Description of land by reference to plan—Construction of deed—Extrinsic evidence of boundaries—Conflicting evidence—Duty of Appellate Court.*

T. was the owner of lot nine, and C. owner of lot eight adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. T., being about to build, employed a surveyor to ascertain the boundary. The surveyor went to the place, and asked C. where he claimed that his northern boundary lay. C. pointed out an old fence, running part of the way across the land between the lots, and an old post, and said the line of the fence produced to the post was his boundary line. The surveyor then took the average line of the fence and produced it till it met the post. He staked out this line, C. not objecting. A few days afterwards, T., with his architect and builder, went on the ground, and, in the presence of C., the builder again marked out the boundary by means of a line connecting the surveyor's marks, C. not objecting. Excavating was commenced according to that line

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[Q.B. Div.]

immediately, and T.'s house was built according to the line on the extreme verge of T.'s land. The first time that C. raised any objection to the boundary so marked was when the walls of T.'s house were up and ready for the roof.

*Held*, that C. was estopped from disputing that the line run by the surveyor, according to which money had been expended in building, was the true line.

Reversing the judgment of the Court of Appeal.

Per STRONG, J.—When lands are described by reference to a plan, the plan is considered as incorporated with the deed, and the boundaries of the land conveyed as defined by the plan are to be taken as part of the description.

In construing a deed of land not subject to special statutory regulations, extrinsic evidence of monuments and actual boundary marks is inadmissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they may be given in evidence and control the description, though they may call for courses, distances, etc., which do not agree with those in the deed.

In 1831, W. D. P., who owned a piece of land, bounded on the south by Queen street, on the east by William street, on the west by Dummer street, and running north some distance, laid out the southerly portion into lots, depicted upon a plan, which plan showed the boundary line between the plaintiff's and the defendant's lots to be exactly 600 feet from Queen street. There were no stakes or other marks on the ground to indicate the boundaries of the lots or the extent of the land so laid out. Many years afterwards, the remaining land to the north of the parcels so laid out was laid out into lots, depicted on another plan, and a street was shown between the northerly limit of the first plan and the southerly limit of the second plan. The actual distance, however, of this street from Queen street was greater than the first plan on its face showed it to be, and the parties owning lots on the first plan appeared to have taken up their lots as if Queen street and the street at the north of the first plan were the actual limits of plan.

Per STRONG, J.—(1) The true boundary line between the plaintiff's and defendant's lots was

a line commencing at a point 600 feet from Queen street, as measured on the ground at the time when the plan was made; but in the absence of evidence showing that a measurement at that time would be the same as a measurement on the levelled street, that point could not be accepted as the true point of commencement of the boundary line in question.

(2) Inasmuch as the conveyances to the parties were made according to the first plan, the second plan could not be invoked to aid in ascertaining the limits of the lots so conveyed.

Where there is a direct conflict of testimony, the finding of the Judge at the trial must be regarded as decisive, and should not be overturned in appeal by a Court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination.

C. Robinson, Q.C., and E. Douglas Armour, for the appellant.

McMichael, Q.C., and A. Hoskin, Q.C., for the respondent.

#### QUEEN'S BENCH DIVISION.

Rose, J.]

ATKYNs v. PTOLEMY.

*Demurrer—Penalty—Party aggrieved.*

In action for a penalty for violation of secs. 154, 142, 245 of 46 Vict. ch. 18, O.,

*Held*, there being no allegation of injury to plaintiff, he was not a party aggrieved under the Act. Also, that a suit for a penalty under the Act can only be brought for violation of s. 118 to s. 166 inclusive.

Lash, Q.C., for demurrer.

Tetzels, contra.

Rose, J.]

REGINA v. YOUNG.

*Criminal law—32, 33 Vict. ch. 21, s. 110—Police Magistrate.*

Defendant sold to C. besides other articles, a horse-power and belt, being portion of his stock in trade as a butcher, in which he also disposed of to him a half interest. One M. owned the horse-power, which had been hired by defendant from him, and the hiring had not expired when defendant sold to C. M., on the expiration of the hiring required its return, but

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C. set up his purchase, on which defendant took it away from where it was kept and gave it to M. He was then convicted under 32-33 Vict. c. 21, s. 110, the conviction stating neither the time nor place of the commission of the offence.

*Held*, no offence within that section, and conviction also bad, as showing neither time nor place of commission of offence.

A police magistrate cannot try summarily for an offence under above sec. of act.

*Clement*, for application.

*Holman*, contra.

### CHANCERY DIVISION.

Ferguson, J.]

[March 17.]

#### ROBINSON V. COOK.

*Mortgage on going factory—Estoppel—Partner of mortgagor acquiescing in mortgage—Assignee for benefit of creditors.*

S. gave a mortgage to R., partly for a past debt, and partly for future advances on certain land, describing them, "together with the machinery and foundry apparatus now in use and that may in future be used in the brick and frame building situate on the said lots used as a machine shop and a foundry down stairs and as a printing office up stairs, the machinery being composed of one printing press, etc., (describing various articles of machinery) together with all the machinery now in or that may hereafter be put in the said premises."

In the proviso in the mortgage, the property was mentioned as "lands and chattels."

The mortgage though duly registered in the registry office, was not filed as chattel mortgages are required to be by statute, and there was not the change of possession mentioned in the statute.

*Held*, that this was, in effect, a mortgage of the machine shop and foundry, and of the printing office, and had the same force and effect as if these had been mortgaged, naming them. The mortgage transaction was in respect of going concerns, and not in respect of land as such, and chattels as such, and the use of the word "chattels" was apparently

for greater caution, lest any of the property might possibly be considered chattels. Therefore, certain articles in question in this action, viz.: two vertical drills, a planer, a grindstone and three iron lathes, which were at the time of the execution of the mortgage on the premises, and were essential parts of these going concerns, passed by the mortgage to the mortgagees.

*Held*, also, following *Kitching v. Hicks*, ante p. 112, the mortgage was in any event good without registration, so far as it was a mortgage upon property brought upon the premises after its date.

The mortgagees now having commenced proceedings under the above mortgage, one C. professed a claim or title to some of the property as an alleged partner of the mortgagor. The evidence, however, showed that he was present when the mortgage was given, and knew all about the transaction; that the money that had been advanced by the mortgagees, was partly for the purposes of the printing office, in which only he claimed to be interested as such alleged partner, and the money then to be advanced, was to be partly for the same purposes, and that he stood quietly by when the transaction was made with the mortgagees without asserting any claim to ownership or part ownership of the property, or giving the mortgagees any information whatever as to the claim he now set up for the purpose of subtracting from the rights of the mortgagees.

*Held*, that under these circumstances, C. was clearly estopped from setting up any right or title as against the mortgagees to the property, and the mortgagees title was just the same as it would have been if C. had joined in the mortgage to them.

The defendant in the present action, an assignee under a deed for the benefit of the creditors of the mortgagor, had removed or was threatening to remove certain of the property comprised in the mortgage. The plaintiffs, besides claiming foreclosure of their mortgage claimed, also, an injunction to restrain the defendant from so acting. In his defence he alleged that at the time of the execution of the mortgage, he was a creditor of the mortgagor, and that after the commencement of this present suit he recovered a judgment for the amount of his debt, and he

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claimed a right to the property as against the plaintiffs as such creditor.

*Held*, that the defendant was entitled thus to avail himself of his position as a creditor at the date of the mortgage, by saying the mortgage was not good; and this although he did not recover his judgment and execution before the commencement of the suit.

An assignee for the benefit of creditors, takes only such title as his assignor had to the property.

*C. Moss*, Q.C., for the plaintiff.

*S. H. Blake*, Q.C., for the defendant.

Ferguson, J.]

[April 25.]

RE STANDARD FIRE INSURANCE CO.

KELLY'S CASE.

*Company—Subscriber to memorandum—Allotment of shares—Winding up.*

Appeal from the Master at Hamilton.

One K., the present appellant, signed a certain memorandum in the following words:—"We, the undersigned, do hereby subscribe for shares of the capital stock of Alliance Insurance Co., and agree to take the number of shares and for the amount set opposite our respective signatures, and to pay on account thereof to the secretary of the said company 10 per cent. of the amount of stock subscribed by us respectively, within 30 days from the day of our several subscriptions."

Before any stock were actually allotted to K., the company was commenced to be wound up. The Act 38 Vict., c. 66, however, which incorporated the Alliance Insurance Co., by sec. 2, vests the shares of the company in the persons who shall subscribe for the same.

*Held*, that K., by signing the above memorandum, became a shareholder, and liable to the 10 per cent. upon his stock at the expiration of 30 days from the date of his subscription; and the above document could not be regarded as simply an application for stock, but amounted to a subscription for stock; and he was a shareholder in the company.

*Nasmith v. Manning*, 5 S. C. 417, distinguished on the ground that an allotment was plainly contemplated by the parties.

*Semble*, that acting within the bounds of its

legislative jurisdiction, the Local Legislature is as omnipotent as any parliament.

*Laidlaw*, for the appeal.

*A. Galt*, contra.

Boyd, C.]

[April 30.]

ARKELL V. ROACH.

*Will—Construction—Married Woman—Statute of distributions—R. S. O., c. 125, s. 25.*

A. died leaving two sons and two daughters, and by her will directed that her property should be invested until C., her eldest son, should attain twenty-one, when it was to be divided into four equal shares, and he was to get the income of one share until he attained thirty, when he was to get his share out and out. The other three shares were to be invested, and the income arising therefrom was to be added to each until each of the remaining three children respectively attained twenty-one, when they were to receive the annual income thereof until the youngest (son), F., attained the age of thirty, when he was to get his share out and out, and thereafter the income of the remaining two shares was to be paid in equal payments to the two daughters, C. and I., until one of them should die, and then to pay one share to the person or persons who would be entitled thereto under the Statute of Distribution in case such share was the property of the daughter so dying. C. married and died before F. attained twenty-one, having made her will and left all her property to her husband for her children.

*Held*, that the proper effect of the will of A. was to vest in C.'s husband and children the one-fourth share that she was to draw the income of for life, and that these are the persons who would be entitled under the Statute of Distributions, pertaining to the personal estate of married women who die intestate. R. S. O. c. 125, s. 25.

*Street*, Q.C., for plaintiff.

*MacLennan*, Q.C., for F. W. Arkell.

*Coyne*, for the defendant, Roach.

Boyd, C.]

[May 7.]

GUNN V. BURGESS.

*Indivisible chattels—Bills of Sale Act, R. S. O., c. 119—Sheriff's Sale.*

A., having purchased from B. a half interest in a celebrated brood mare, paid in his

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[Prac.]

purchase money \$50 more than the half interest was worth, on the understanding that B. was to keep and take care of the mare for a year, when A. was to have her, and her expenses were thereafter to be shared equally between them. The bargain was that they were to keep her for breeding purposes and share the profits equally.

During the year that B. was to keep her, she was seized and sold by the sheriff under an execution against B., but notice of A.'s claim was given to the sheriff and publicly at the sale. Subsequently the mare had a colt which was *in gremio* at the time of the sale.

In an action by A. against C., the purchaser at the sheriff's sale, in which C. contended that the Bills of Sale Act, R. S. O. c. 119, avoided the plaintiff's title as against the execution it was

*Held*, that the Act was intended to apply to personal chattels susceptible of specific ascertainment and of accurate description, and capable of being transferred and possessed *in specie*, and did not apply to an indivisible chattels like that in the present case. That A. and B. were tenants in common of the mare; that B.'s possession of the mare was not his sole or exclusive possession, but the possession of both; that the sheriff's sale passed only B.'s interest in the mare, and C., by his purchase, became a co-owner with A.; that the property in the colt followed that of its dam, and that A. was an owner of an undivided moiety in both.

Moss, Q.C., for plaintiff.

Cassels, Q.C., and Fletcher, for defendant.

Proudfoot, J.]

[May 14.]

HAMMILL V. HAMMILL.

*Will—Construction—"Effects."*

A testatrix, by her will, after giving to her two sons a certain mortgage, and after sundry other specific bequests continued as follows:—

"I further direct that the balance of personal property consisting of notes and other securities for money, be given to the children of my two sons aforesaid, that is to say, one-half of that amount to be given to the children of my son T. H., and the remaining half to the children of my son S. H., aforesaid; also, that if there be any other effects possessed by me

at the time of my decease, that the same be divided equally in value among my grandchildren, share and share alike."

The testatrix had no real estate at the date of the will, but she afterwards in her lifetime collected the money due on the mortgage, and invested it and other funds in the purchase of certain lands which were conveyed to her by deed on May 31st, 1880. She died on August 31st, 1883.

*Held*, that the grandchildren were entitled to the lands and personal estate of which the testatrix died seized and possessed, not specifically bequeathed.

It appeared clear that the testatrix did not mean to die intestate as to any part of her property. The clause directing the disposition of her personal property, consisting of notes and other securities for money, appeared to be distinct from that as to her other effects. Each is complete in itself. In one the grandchildren take *per stirpes*, in the other *per capita*; and, therefore, the word "personal" must not be read as necessarily connected with "effects," and the cases show that the word "effects" is wide enough to carry the real estate.

## PRACTICE.

Boyd, C.]

[Dec. 31, 1883.]

ROBSON V. ROBSON.

*Partition—Incumbrances—Inquiry as to.*

The usual order in Chambers for partition or sale under Chy. G. O. 640, was pronounced on 15th May, 1882.

The Master reported on the 21st March that part of the lands had been sold on the 17th November, 1882, and that there were no incumbrances on the whole or any of the shares.

Upon petition by the purchaser for a reference back to the Master to take further accounts and inquire as to incumbrances.

*Held*, that the Master should ascertain and report what incumbrances affect the property down to the time of the sale, and not merely at the time when the order in Chambers was pronounced.

Report referred back to the Master.

Meek, for the petitioner.

Bigelow, for the plaintiff.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Boyd, C.]

[March 3.]

RE STUBBING, ANTHES v. DEWAR.

*Administration—Solicitor's commission under G. O. Chy. 643—Practice.*

In an administration suit in which the estate was insolvent, the total assets being \$72,000, the liabilities \$138,475, and the creditors being 100 in number, and in which the commission of the solicitor who acted for all parties was allowed by the Master under G. O. Chy. 643, at \$995, eight creditors at the close of the suit, and without notice to the solicitor, until fourteen days before moving, applied for an order for the delivery and taxation of the solicitor's bill, instead of the allowance of the commission, on the ground that the commission was excessive.

*Held*, that the commission was not so exorbitant as to warrant the substitution of a taxed bill and a probable reduction by that mode of payment, especially as the benefit to the creditors would be trifling.

The scope of G. O. Chy. 643, is merely to aid in fixing a solicitor's remuneration. It is not intended to do strict justice, but is only a sort of convenient expedient for fixing costs without taxation.

A very liberal compensation in such cases is not *per se* a reason for reducing the commission or directing the taxation of a bill in its stead, nor *per contra* is a low or inadequate compensation a reason for increasing the commission, or directing payment by a taxed bill.

*Seem*, that in cases affected by this order any party interested in the estate who may desire that a solicitor should be paid in the particular matter or suit on the scale of a taxed bill instead of by commission, should give notice to the solicitor to that effect, and have the Master note it in his book, at the earliest stage possible in the proceedings; but there is no practice authorizing the substitution of a bill of costs for commission at the option of any party.

C. Bitzer, for the motion.

Hoyles and J. King, contra.

Galt, J.]

[March 28.]

BOOK v. RUTH.

*Appointment of Receiver.*

Motion for a receiver under the following circumstances:—The plaintiff had a judgment

against the defendant. The father of the defendant died a short time ago leaving the income to his wife for life, and on his death directed his executors to divide the corpus among certain parties, amongst others the defendant. *Foyle v. Bland*, L. R. 11 Q. B. D. 711, was cited as authority.

The learned judge made the following order:—Upon the motion of the plaintiff for an order that he be appointed a receiver without security and without salary, to receive the reversionary interest which the defendant has or may be entitled to under the will of his late father, Jacob Ruth, and all moneys that may be payable to the defendant under the provisions contained in the will of the said Jacob Ruth, upon reading, etc.,

1. It is ordered that the plaintiff be, and he is hereby, appointed receiver, without security and without salary, to receive the reversionary interest which the defendant has or may be entitled to under the will of the said Jacob Ruth, and all moneys that may be payable to the defendant under the said will, till the amount due the plaintiff for debt, interest and costs on his judgment recovered the second day of June, one thousand eight hundred and seventy-seven, and for costs of and incidental to this motion be fully paid and satisfied.

2. And it is further ordered that the costs of and incidental to this motion of the executors be retained by the said executors out of the share of the testator's estate coming to the defendant.

Boyd, C.]

[April 2.]

RE MURRAY CANAL, LAWSON v. POWERS.

*Marriage with deceased wife's sister—Uncanonical marriage—Tenancy by the courtesy—Will by infant married woman—45 Vict. c. 42. D.*

In 1866 one S. H. died undisputed owner of certain lands, leaving him surviving his widow and three daughters. The widow died in 1869. The eldest daughter married one L., and pre-deceased her mother, leaving L. surviving. The second daughter also pre-deceased her mother, and died unmarried and without issue. The youngest daughter, G., in 1869, married L., who thus married his deceased wife's sister. They had issue one child, who died in G.'s lifetime. In 1871 G. died. From before 1871

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

up to the commencement of this action, 1883, L. was in continuous occupation of the above-mentioned lands.

On a reference to the Master, he held L. had obtained title by possession against the heirs of G., on the ground that the marriage with G. was uncanonical, and, therefore, L. was not in as tenant by the courtesy, and 45 Vict. c. 42, D. did not come into force until after the heirs were barred.

*Held* now, on appeal, that the occupation of L. was not to be attributed to his rightful character, which was that of tenant by the courtesy, so as not to work tortiously against the heirs-at-law of his wife.

The marriage of a man with his deceased wife's sister was not *ipso facto* void by English law, which was adopted in 1792 as the law of this country by 32 Geo. III. c. 1. Such a marriage was esteemed valid for all civil purposes, unless a sentence of nullity was obtained from the ecclesiastical courts during the lifetime of the parties. This state of the law was not affected in this country, as is pointed out in *Hodgins v. McNeil*, 9 Gr. 305. This continued the law here until 45 Vict. c. 42, D. was passed in 1882, by the first section of which all laws prohibiting marriage between a man and the sister of his deceased wife are repealed, both as to past and future marriages, and as regards past marriages, as if such laws had never existed.

It is incorrect to say, with Blackstone, Vol. II. p. 127, that it is essential to a tenancy by the courtesy, that the marriage must be canonical and legal. The requisition of a canonical marriage is not essential; and when G. died, in the present case, L. was in possession as life tenant by the courtesy, and the Statute of Limitations did not run in his favour.

In a so-called will, executed a few days before her death, G. assumed to devise the land in question to L. At the date of this will G. was only eighteen years of age.

*Held*, that the will was invalid. C. S. U. C. c. 73, s. 16 (R. S. O. c. 106, s. 6), with respect to devises and bequests of the separate property of married women only removed the disability of coverture, not of infancy.

C. Moss, Q.C., for the appeal.

W. R. Riddell, contra.

Master in Chambers,]

[April, 28.

## FEDERAL BANK V. HARRISON.

*Counter claim—Surety—Indemnity.*

An action against the defendant on his bond as surety for H. & McT., for the amount due the plaintiff by H. & McT. on their banking account with the plaintiff.

Counter claim by the defendant against the plaintiff and H. & McT. alleging that the defendant is liable only as such surety, and that the plaintiff ought to resort to H. & McT. to enforce payment from them, and that H. & McT. should be ordered to pay the amount and indemnify the defendant.

The counter claim was not rested upon any particular agreement, but was set up as arising from the position of the parties as creditors, principal and surety.

The Master held the counter claim bad and struck it out.

*Holman*, for the plaintiff, and defendant by counter claim.

*Aylesworth*, for the defendant.

Rose, J.]

[May 12.

## SAME CASE.

Upon appeal argued by the same counsel, ROSE, J., upheld the order of the Master, and dismissed the appeal with costs.

Master in Chambers.]

[May 3.

## NEW YORK PIANO CO. V. STEVENSON.

*Notice of trial—Revivor.*

The original defendant dying *pendente lite*, the plaintiffs issued an order of revivor on the 22nd April, and served it on the defendants by order on the same day, and along with it a notice of trial for the 5th May at Cornwall.

The defendant moved to set aside the notice of trial as irregular.

*Held*, that as the order of revivor would be confirmed by the lapse of twelve days upon the 4th of May, the notice of trial for the 5th of May was regular.

*Holman*, for the motion.

*Hoyle*, contra.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

HILARY TERM, 47 Vict., 1884.

During this term the following gentlemen were called to the bar, namely:—

Messrs. James Bicknell, gold medalist and with honours; George Walker Marsh; Donald Cliff Ross, John Young Cruikshank, Edward James Hearn, Wilmott Churchill Livingston, Robert Walter Witherspoon, George Frederick Cairns, Francis Stewart Wallbridge, Moses McFadden, Frederick Augustus Munson, Daniel Urquhart, Edward Guss Porter, James Burdett, Alexander Monro Grier, Edmund Campion, John James Mac-laren. The last three being under Rules in special Cases.

And the following gentlemen were admitted into the Society as Students-at-Law, namely:—

Matriculants — John Frederick Gregory, William Edward Kelly, William Wesley Dingman, John Hind Hegler.

Junior Class — Michael H. Ludwig, Franklin Smoke, John B. McColl, Robert Wilson Gladstone Dalton, James Joseph McPhillips, Frederick Rohleder, Patrick Kernan Halpin, John Wesley Coe.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

## Articled Clerks.

- 1884 and 1885.
- Arithmetic.
  - Euclid, Bb. I., II., and III.
  - English Grammar and Composition.
  - English History—Queen Anne to George III.
  - Modern Geography—North America and Europe.
  - Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

## Students-at-Law.

- (Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- 1884. (Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- (Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- 1885. (Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar.

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnehose, Lazare Hoche.

## OF NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

## FIRST INTERMEDIATE.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

## FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

## FOR CALL.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants' of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## FEES.

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

Copies of Rules can be obtained from Messrs. Rowsell & Hutchison.

# Canada Law Journal.

VOL. XX.

JUNE 1, 1884.

No. 11.

## DIARY FOR JUNE.

1. Sun....*Whit Sunday*. Parliament first met in Toronto, 1797.
2. Mon....*Penian attack*, 1866.
3. Tues....*Maritime Court Sittings*.
7. Sat....*Easter Sittings of Common Law Division*, H. C. J. end.
8. Sun....*Trinity Sunday*. Parliament first met at Ottawa, 1866.
9. Mon....*County Court Term and Surrogate Court Term* (York).
10. Tues....*General Sessions and County Court* (ex. York).
14. Sat....*County Court and Surrogate Terms* (York), end.
15. Sun....*1st Sunday after Trinity*. *Magna Charta signed* 1215.

TORONTO, JUNE 1, 1884.

By a slip of the printer in our last number we see that in the twelfth line from the top of page 194, in our report of the case of *Re Murray Canal, Lawson v. Powers*, the small but important word "not" has been inserted. We must apologize to our readers for this *addendum* of the printer, and *corrigendum* of our own.

It was not in vain that Mr. Oscar Wilde visited Canada last year. But yesterday we came upon two gentlemen taxing bills of costs, and each bearing large bundles of lilies of the valley in their respective button-holes. For our own part we should have thought it doubtful policy thus to call out the softer feelings of the taxing master, for fear they should take the form of commiseration for the unfortunate client. However, as a study for the painter, the subject might well make a companion picture to that of the other gentleman, emigrant to Manitoba, who was discovered "tooling" a team of oxen over the prairie with an eye-glass stuck in his eye.

WHEN the critic of the *Canadian Law Times* made the brilliant remark that the subject of *addenda et corrigenda* had been "exhausted by previous authors," he had no doubt in view the last editions of Daniel's Practice, in which there are 100 pp. of *addenda et corrigenda*, or rather more than 5 pp. for every 100 pp. of text; or Seton on Decrees, where we find 40 pp. of *addenda et corrigenda*, or  $2\frac{1}{2}$  pp. for every 100 pp. of text. One would imagine from his objection to tables of *addenda*, etc., that our contemporary must have secured for its critic the same sapient individual who recently in the pages of an American periodical affirmed that a table of cases appended to a law book is as superfluous as the hair on the end of a man's nose.

WE have received from Ottawa the report of the Commissioners appointed to consolidate and revise the Statutes of Canada. This report comprises the drafts of sixty-two chapters, "forming a large proportion," as the Commissioners say, "of the work entrusted to them," but the Acts relating to subjects of more especial interest to lawyers, such as banks and banking, and bills of exchange and promissory notes, have not yet been reached. The list, however, includes an Act respecting the Liability of Carriers by Water, an Act respecting Controverted Elections of members of the House of Commons, and an Act to provide for more effectual inquiry into the existence of corrupt practices at elections of members of the House of Commons. Lastly is included an Act respecting indictable offences. As to this the Commissioners report as follows:—  
"With respect to the consolidation of the

## RECENT ENGLISH DECISIONS.

criminal law, the attention of the Commission was naturally called to the draft criminal code appended to the report of the Royal Commission appointed in 1878 by Her Majesty, to consider the law relating to indictable offences, and to the bill to establish a code of indictable offences, founded on the draft code and submitted to the Imperial Parliament in 1879 and 1880. In considering the draft code and comparing it with the provisions of the present Criminal Law of Canada, it was thought advisable to prepare and submit, for the consideration of Parliament, a Bill to constitute a code of indictable offences for Canada, in the preparation of which advantage could be taken of the labours of the English Commission." These remarks suggest to one how useful it would be if, in consolidating those Acts which relate to matters of law, strictly so-called, rather than to matters of administration, the commissioners were to make a marginal reference to any corresponding English enactments. The same remark applies to our Ontario Statutes. We have few enactments on our statute books relating to matter of pure law which are not taken from some English statute; though, in certain acts, such as those relating to patents, America has furnished, to some extent, a model. It would be a great assistance to the practising lawyer if, in consolidating these statutes, as well as in the original volumes in which they are first published, there was a marginal reference to the source from which they come. It is needless to dwell upon the facility this would give in finding authorities bearing upon their construction.

## RECENT ENGLISH DECISIONS.

The May number of the *Law Reports* comprise 12 Q. B. D. pp. 309-489; 9 P. D. 45, 66; and 25 Ch. D. pp. 663-786.

ARBITRATOR—REVOCATION OF AUTHORITY—  
R. S. O. c. 50, s. 216.

In the first of these the first case, *In re an arbitration between Fraser & Co., and Ehrensperger and Eckenstein*, was the subject of some remarks which will be found at p. 164 of the May 1st number of this Journal. The point decided may be again briefly stated here, viz.: that where there is an agreement to refer a dispute to two arbitrators, one to be appointed by each party, but no agreement to make the submission a rule of court, and the submission has not been made a rule of court, and, one of the parties having failed to appoint an arbitrator, the other party by virtue of s. 13 of the Common Law Procedure Act, 1854, (R. S. O. c. 50, s. 216) appoints his arbitrator to act as sole arbitrator, the authority of such arbitrator may be revoked by either party before an award is made. The M. R. points out that an arbitrator so appointed to act alone is not a judge, but a mandatory, what may be called "a statutory mandatory," and as much an arbitrator as any other arbitrator, and equally liable as any other to have his authority revoked, there being nothing in the statute prohibiting this being done.

## APPELLATE COURT—LONGSTANDING DECISION.

Before leaving this case attention may also be called to a *dictum* of the M. R. with reference to Appellate Courts reviewing decisions of inferior courts which are of old standing, and have been frequently acted upon. Referring to the decision in *re Rouse and Meier*, L. R. 6 C. P. 212, he says: "We have, it is true, the power of reviewing that decision, but where there is a decision as that is on the course of procedure which has been made more than twelve years ago, and which therefore

## RECENT ENGLISH DECISIONS.

must necessarily have been frequently acted on during that time, and no one has gone to the Legislature to have it altered, this Court of Appeal, even if it differed from such decision, would not now be disposed to over-rule it.

CRIMINAL INFORMATION—LIBEL ON DECEASED FOREIGN NOBLEMAN.

The next case, *The Queen v. Labouchere*, p. 320, was an application for a rule calling upon the defendant to shew cause why a criminal information should not be filed against him for a libel upon the deceased, father of the applicant, who was the Duke of Vallembrosa. The libel complained of, it may be remembered was a paragraph in *Truth* stating that the father of the applicant had been "an army contractor who was nearly hanged on the charge of supplying as meat to a French army corps the flesh of soldiers who had died in the hospital or who had been killed in battle." In his judgment Lord Coleridge, C.J., states that acting under the power conferred by the Judicature Acts, he had brought together five judges of the High Court, to establish, if possible, upon unusual authority some principles for the guidance of the Court in future in respect to criminal informations. The result arrived at by the concurrent judgment of all the judges is that criminal informations should be granted only in cases which come fairly within the language of Sir W. Blackstone when he says (Book iv. c. 23, p. 309):—"The objects of the other species of information filed by the master of the Crown Office upon the complaint or relation of a private subject are, any gross and notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind not peculiarly tending to disturb the government (for these are left to the care of the Attorney-General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion." Therefore the ap-

plication was refused in the present case, the applicant being a private person, and the libel in question not falling within the above language of Sir W. Blackstone. It was observed also that the fact that the applicant did not reside in England was a strong reason for rejecting the application, and moreover that weight of authority was in favour of the view that an application for a criminal information for a libel upon a deceased person made by his representative will not be granted. Denman, J., finally, takes occasion to observe that he could not accept the passage from Blackstone as being quite an exhaustive description of the cases in which the Court ought to interfere. "For example," he says, "if a newspaper or an individual were to shew by repeated attacks, and by wide circulation of those attacks, upon a private individual, whether a British subject or a foreigner, whether resident in England or abroad, a persistent determination to persecute, as at present advised I should think it would be the duty of the Court to protect the individual by granting a rule, and even, in case of further persistence, by making it absolute."

Next follows certain practice cases which will be noted in the proper place, and certain decisions on the subject of parliamentary and municipal franchise, the income tax, and certain special English acts which it is not necessary to mention, and the only remaining case which it seems important to note among the Queen's Bench Division cases, is *The Queen v. Master Manley Smith*, p. 481.

MANDAMUS—PETITION OF RIGHT.

In this case the question is raised whether a mandamus should be granted to an applicant, when it was open to him to seek his remedy by a petition of right; in other words whether a petition of right was such a specific legal remedy that the existence of it should prevent the issuing

## RECENT ENGLISH DECISIONS.

of a writ of mandamus. As to the particular circumstances under which the mandamus was sought in this case, it is sufficient to say, it was to compel the Commissioners of Inland Revenue to return a certain portion of over paid probate duty. It was conceded that a mandamus ought not to be granted if there is any other legal remedy, but the Queen's Bench Division decided that a petition of right was not such a legal remedy as is intended in that proposition; because it depends upon the fiat of the Crown, and is not an absolute legal remedy. The Court of Appeal overruled this decision. At p. 475 Brett, M.R., says— "where there is no specific remedy by which justice can be done, the Court will grant a mandamus, but when there is a specific remedy by which the subject will get justice by a judicial decision of the Court, then it is within the reason of the rule, that if there is such a remedy a mandamus ought not to issue. I am of opinion that a remedy by a petition of right would enable the prosecutor to obtain satisfaction by means of a judicial decision of the Courts of this country, and that therefore it is within the rule. I leave the question at present open, if the fiat were refused what would be done? Whether the Queen's Bench Division might not issue a mandamus, if a petition of right could not be maintained, I do not in this case decide." And Bowen, L.J., in an interesting passage at p. 478-9, summarises the matter: "A writ of mandamus, as everybody knows, is a high prerogative writ, invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done. The proceeding, however, by mandamus, is most cumbrous and most expensive; and

from time immemorial accordingly the Courts have never granted a writ of mandamus when there was another more convenient, or feasible remedy within the reach of subject. It was not to his interest that it should be granted, and the reason for asking for it had ceased. A petition of right when the Crown is willing to grant its fiat is as good a means of getting justice against the Crown as any that could be conceived. All the procedure, or almost all the procedure, can be applied to a proceeding by way of a petition of right that is available to the subject in an ordinary action against another subject; and there is no distinction at all in the case of a debt claimed against the Crown, so far as facility of procedure is concerned, between a petition of right and an ordinary action by one subject against another, except this, that the fiat of the Crown must be obtained before the Crown is harassed by a suit; but everybody knows that that fiat is granted as a matter, I will not say of right, but as a matter of invariable grace by the Crown whenever there is a shadow of claim, nay, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the fiat unless the claim is frivolous."

## MANDAMUS—APPEAL.

Attention may also be called to the point that this case shews that the exercise of the discretion of the Court in granting or refusing a mandamus is an appealable matter, as to which Smith, J., at p. 467 seems to express some doubt.

In the number of the Probate Division for May only one case calls for mention, viz.: *In the goods of L. H. Homan*, at p. 61.

## ADMINISTRATION—SISTER—WIDOW.

Here in a contest for administration with the will annexed the Court preferred the sister of the testator to the widow, as it appeared that the sister, as a legatee, had the larger interest in the property to be distributed.

## RECENT ENGLISH DECISIONS.

Proceeding now to the May number of the Chancery Division, the first case, *Carter v. White*, p. 666, raises a curious point.

## BILL OF EXCHANGE—PRINCIPAL AND SURETY.

In 1874 White lent £500 to Randle, and certain stock were deposited by Noble as security. Randle also gave White two Bills of Exchange for £250 each, accepted by him, but with the drawer's name in blank. Randle died without either of the bills being presented, and without the name of the drawer being inserted. Moreover, the statute of limitations had run against the bills. Noble now claimed that his stock should be treated as discharged from all claim of White. It was proved that Noble knew all through that the bills were acceptances only, and not perfect bills. The Court of Appeal now sustained Kay, J. (20 Ch. D. 225), in dismissing the action, holding (1) that the Bills of Exchange could be filled up and perfected by the insertion of Randle's name as drawer, though Randle was dead, for the power which White had to fill up the acceptances was not in consequence of White being appointed by Randle his agent to fill them up on his behalf, but in consequence of a contract that the person to whom they were given, or anyone authorized by him, should be at liberty to fill them up, which contract was not put an end to by the death of the acceptor; (2) the fact that the bills were not presented for payment, and no notice of payment was given to Noble, did not discharge the latter, but there is a well-decided difference in this respect between those who are sureties for the payment of a bill and those who are parties to it; and a man merely guaranteeing the payment of a bill, but not a party to it, is not discharged by the neglect of the holder to give him notice of dishonour, unless he has been actually prejudiced by such neglect; (3) the surety was not discharged by reason of the omission to sue on the bills until the statute of limitations had

run, for the surety could at any time pay off the debt and sue the debtor in the name of the creditor, or call on him to sue.

## MORTGAGOR AND MORTGAGEE—LEASE SUBSEQUENT TO MORTGAGE.

The next case requiring mention here is *Corbett v. Plowden*, p. 678. This illustrates this point of law—that one who holds under a lease, or an agreement for a lease, from a mortgagor, made subsequently to the mortgage and without the privity of the mortgagee, and who is afterwards called upon by the mortgagee to pay his rent to him by virtue of the latter's paramount title as mortgagee, ceases thereupon to hold under the lease from the mortgagor and forthwith becomes merely a tenant from year to year of the mortgagee, liable to pay the previously existing rent to the mortgagee. Consequently where in this case one entered under an agreement for a lease for twenty-one years, and afterwards, on demand of the mortgagees by virtue of their superior title, paid his rent to them and then gave a proper notice to determine his tenancy as a tenant from year to year, and the mortgagees and mortgagor forthwith commenced an action for specific performance to compel him to take a lease for twenty-one years, as agreed with the mortgagor. The Court of Appeal dismissed the action on the ground that the notice given by the mortgagees to the tenant to pay the rent to them, had put an end to the agreement between the tenant and the mortgagor. Lord Selborne, L.C., observes: "I am very sorry that in such a case as this the law should be that no privity can be presumed between the mortgagor and mortgagee as to leases subsequent to the mortgage, but so the law is." And he says that the mortgagees having asserted their paramount right, it was too late for them to adopt the agreement between the mortgagor and tenant and bring an action to enforce it against the tenant. It is inti-

## RECENT ENGLISH DECISIONS.

mated that it would have been different if, instead of asserting their independent superior title as mortgagees, the latter had claimed to receive the rents merely as agents of the mortgagor.

## TRUSTS—COSTS OF ACTIONS BROUGHT BY TRUSTEES.

The case of *Stott v. Milne*, p. 710, may be noticed on account of two propositions which it illustrates and enforces: (1) That it does not follow that because an action is advised by counsel it is always and necessarily one which trustees may properly bring, and consequently one the costs of which are properly payable out of the estate. The advice of counsel is not an absolute indemnity to trustees in bringing an action, though it may go a long way towards it. (2) The right of trustees to indemnity against all costs and expenses properly incurred by them in the execution of the trust, is a first charge on all the trust property, both income and *corpus*; and the trustees accordingly have a right to retain them out of the income until provision can be made for raising them out of the *corpus*.

## ORDER FOR SALE—CONVERSION.

In the case of *Hyett v. Mekin*, again, at p. 735, the point of law decided may be briefly mentioned, and in the language of Kay, J., is as follows: "If, in an action for administration of an estate the Court in the exercise of its undoubted jurisdiction makes an order for the sale of the estate, the order for sale will amount in itself to a conversion," and consequently if one of those entitled to share in the estate die subsequently to the order for sale, and before the actual sale, his share will pass to his personal representatives and not to his legal heir.

## COMPANY—RESPONSIBILITY OF DIRECTORS.

Lastly must be noticed the case of *In re Denham & Co.*, p. 752, which is a case of great interest to directors of companies in these days of roguery. In

the words of the head note the case shews that an innocent director of a company is not liable for the fraud of his co-directors in issuing to the shareholders false and fraudulent reports and balance-sheets, if the books and accounts of the company have been kept and audited by duly appointed and responsible officers, and he has no ground for suspecting fraud, and consequently, if such a director has received, together with the other shareholders, dividends declared and paid in pursuance of such reports and balance-sheets, such dividends having been in fact, payments out of capital, he cannot be called upon to repay the dividends so paid, nor even the dividends received by himself. The following passages from the judgment of Chitty, J., who decided the case show clearly the view he took of the law: "A report of directors to shareholders, and a prospectus issued to the public for the purpose of obtaining subscriptions stand obviously upon a different footing. Speaking generally, a prospectus purports to be issued by all the directors whose names appear on the face of it; and it may well be that an ignorant director who has not really been personally engaged in issuing the prospectus is bound on the ground of his ratification; and such ratification may, when circumstances justify it, be inferred from his abstaining from taking any steps to inform the public that he was not a party to issuing the prospectus. But the report of directors, at a general meeting is issued under the powers of the articles and is generally, as it certainly was here, made by the board acting as such. The shareholders in this company knew, or must be deemed to have known, the provisions of the articles that two directors were to be a quorum, and therefore they were not justified, in my opinion, in accepting the report as the act of all the directors. Mr. C. (the director proceeded against) was not under any obliga-

## RECENT ENGLISH DECISIONS—SELECTIONS.

tion to disclaim the reports and balance sheets, and the attempt to fix him personally for them, in my opinion, fails. Neither, in my opinion, is he liable in respect of one particular dividend because he moved the formal resolution for it at a general meeting. . . . No man is bound to presume a fraud, and, as Lord Hatherley said in the case of *Land Credit Company of Ireland v. Lord Fermoy*, L. R. 5 Ch. 772, "whatever may be the case with a trustee, a director cannot be held liable for being defrauded; to do so would make his position intolerable." It is sufficient if directors appoint a person of good repute and competent still to audit the accounts and have no ground for suspecting that anything is wrong. The directors are not bound to examine entries in the company's books. As the late M. R., Sir George Jessel, said in *Hallmark's case*, L.R. 9 Ch. D. 332, "I know no case except *ex parte Brown*, 19 Beav. 97, which shows that it is the duty of a director to look at the entries in any of the books, and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge which it is sought to impute to him in this case."

The remaining cases in the May Law Reports requiring notice, are on points of practice, and will be noted among Recent English Practice Cases.

A. H. F. L.

## SELECTIONS.

## A REASONABLE TIME.

*In General.*—With the adoption of the common law in this country, came also many grave obstacles. Among them is the rule requiring certain acts to be performed in a reasonable time. If anything is to be done, as goods to be delivered and the like, and no time is mentioned in the contract when the delivery shall take place, the common law then steps in and says, it is presumed that the parties intended that fulfilment shall take place in a reasonable time,\* and then we are left in the dark again. Here we grope, endeavouring to find some ray of light or something tangible to lay hold of which will in any way assist us to a rule of law, by which we may decide for ourselves, whether in a given case a reasonable time would be one day or two; two years or four. But we have some rules tending, no doubt, to define the term "reasonable time," and we are equally safe in asserting they were made with a view to enlightening the subject. Thus it is said, a reasonable time is such a time as preserves to each party the rights and advantages he possesses and protects each party from losses that he ought not to suffer. A reasonable time is defined by the Kentucky courts to be "so much time as is necessary, under the circumstances, to do conveniently what the contract requires

\* To the effect that when no time is specified in the contract, it must be a reasonable time. *Adams v. Adams*, 26 Ala. 272; *Luckhart v. Ogden*, 30 Cal. 547; *Wright v. Maxwell*, 9 Ind. 192; *Waterman v. Dutton*, 6 Wis. 265; *Cocker v. Franklin*, 3 Sumn. 530; *Watts v. Sheppard*, 2 Ala. 425; *Sawyer v. Hammatt*, 15 Me. 40; *Little v. Hobbs*, 34 Id. 357; *Howe v. Huntington*, 15 Id. 350; *Atkinson v. Brown*, 20 Id. 67; *Lindsey v. Police Jury*, 16 La. Ann. 389; *Atwood v. Clark*, 2 Me. 249; *Warren v. Wheeler*, 8 Met. 97; *Wiswall v. McGowan*, 1 Hoff. 125; *Roberts v. Beatty*, 2 Pa. 63; *Butler v. O'Hear*, 1 Desau. (S. C.) 387; *Atwood v. Cobb*, 16 Pick. 297; *Phillips v. Morrison*, 3 Bibb, 105; *Ellis v. Thompson*, 3 M. & W. 445; *Clark v. Remington*, 11 Met. 361; *Startup v. McDonald*, 6 M. & G. 593; *Hales v. N. W. R. Co.*, 4 B. & S. 66; *Graves v. Ashlin*, 3 Camp. 426. See, also, *Kingsley v. Wallis*, 14 Me. 57; *Wilson v. Stange*, 17 Mich. 201.

## SELECTIONS.

to be done." \* Reasonable time does not begin to run until some one interested in the matter calls for something to be done concerning it. † It should be fixed according to the customs of business and circumstances, or to the intent of the contracting parties. But here, however, another question presents itself, whether or not extrinsic evidence is admissible to prove the time contemplated in these contracts. If the language of a contract has a settled legal meaning, no evidence can be admitted to construe it. For instance a promise to pay money, no time being expressed, means a promise to pay it on demand, and evidence that payment on a future day was intended is not admissible. ‡ But a promise to do something other than pay money, no time being expressed, means a promise to do it within a reasonable time, as we have already seen. In such a case it seems that a contemporaneous verbal agreement that the matter stipulated for in the written agreement should be done at a particular time, would be inadmissible as it would tend to vary the contract, § unless it be in connection with other circumstances going to show what a reasonable time is under the facts of the case. || The contract of marriage, if no time is specified for performance, is in law a contract to marry in a reasonable time after request, and in case either party refuses to perform his or her agreement, the other may have an action for damages. The Roman law very properly provided that the term of two years was amply sufficient for the duration of the contract of betrothment. ¶ On a contract to deliver a certain article to the plaintiff as required by him, it is not necessary that it be demanded in a reasonable time, but only as he requires it. \*\* But since it is so well settled that a reasonable time in which to perform the contract is the rule, it is un-

necessary to pursue the inquiry any further in this direction, and we will proceed to note when reasonable time is a question of law.

*When Reasonable Time is a Question of Law.*—It has been the cause of some perplexity in the courts to determine whether the question of reasonable time was one of law or of fact, and they are not even now quite harmonious. No doubt it is desirable that the court decide the question, when it can be done, without trespassing on the province of the jury, and most courts are inclined to this view. Says Lord Coke: "Reasonable time shall be adjudged by the discretion of the justices, before whom the cause dependeth; and so it is of reasonable fines, etc.; for reasonableness in these cases, belongeth to the knowledge of the law, and therefore, to be decided by the justices. Nothing that is contrary to reason is consonant to law." \* The great difficulty, however, seems to lie in this; that the facts are so often, so completely imbedded in the question of law, that it is almost impossible to separate them and when this is the case, the whole question is left to the jury. It is said, if by the application of legal principle the court may determine the question as reasonableness of time, then it ought to do so. In *Luckhart v. Ogden* † Mr. Justice Curry attempts to define the separate duties of court and jury, in the determination of this question by saying, "The term reasonable time, is a technical and legal expression which, in the abstract, involves matter of law as well as matter of fact. Whenever any rule or principle of law, applies to the special facts proved in evidence, and determines their legal quality, its application is a matter of law. . . . When the law itself prescribes what shall be considered to be a reasonable time in respect to a given subject, the question is one of law, and the duty of the jury is confined to finding the simple facts. When, on the other hand, the law does not, by the operation of any principle or established rule, decide upon the legal quality of the simple facts, or *res gestæ*, it is for the jury to draw the general inference of reasonable or unreasonable in point of facts. In

\* *Blackwell v. Fosters*, 1 Met. (Ky.) 95. See also, *Hill v. Hobart*, 16 Me. 168.

† *Cameron v. Wells*, 30 Vt. 633; *Graham v. Van Diemens Land Co.*, 30 E. L. & Eq. 573.

‡ *Pars. on Cont.*, p. 551, Vol. II.

§ *Shaw, C. J.*, in *Attwood v. Cobb*, 16 Pick. 231; *Wilson v. Stange*, 17 Mich. 341; *Simpson v. Henderson*, Mood. & M. 300; *Barringer v. Sneed*, 3 Stew. 201; *Sewall v. Wilkins*, 14 Me. 168.

|| *Cocker v. Franklin*, 3 Sumn. 530; *Ellis v. Thompson*, *supra*.

¶ *Cod. Lib.* 5 Tit. 1 2.

\*\* *Jones v. Gibbons*, 8 Ex. 920.

\* *Co. Lit.* 56 b.

† 30 Cal. 547. See also, *Starkie Ev.*

## SELECTIONS.

such cases the legal conclusion follows the inference of fact; in other words, the question of reasonable time etc., is one of fact, and the time is reasonable or unreasonable in point of law, according to the finding of the jury in point of fact." While the doctrine enunciated in *Sarkey* does not meet with the entire approval of *Shepley, J.*, still he says in *Howe v. Huntington*,\* "When there is a certain epoch after which the act is to be performed, as soon as it may be conveniently without regard to one's interest or to the course of trade or to other matters, not within the control of human agency, the court may be able to come to a satisfactory conclusion for itself without the assistance of a jury."

Another statement of the principles which aid in solving the question is contained in the opinion of *Hubbard, J.*, in *Spoor v. Spooner*.† He says, "So also as to contracts, when something is to be performed, and the contract is silent on the subject, what is a reasonable time for performance, is held to be a matter of law.‡ And so when the facts are agreed, reasonable time is a matter of law. But when the facts are controverted, and the motives of the parties are involved in the question, reasonable time is a question for the jury.§ In the case at bar the facts were in dispute, and the conduct of the several parties was to be considered, and we are of opinion, that the question of the plaintiff's negligence, under all the circumstances in evidence was properly submitted to the jury." In regard to rescinding a contract for fraud, it has been held in *Indiana* that "when there are no facts involved but the simple one of length of time elapsed, it is a question of law. But when disputed facts involving questions of excuse, of time of discovery of the fraud, etc., as in this case are to be passed upon, the question, like that of due diligence in the prosecution of an assigned promissory note, is a mixed one of law and fact, and is for the jury."|| It will be seen that

substantially the same rule has been adopted in all the cases referred to. If the question of reasonable time can be settled in any particular case by applying principles of law, without passing judgment on the facts it is for the court to decide; otherwise it must be left to the jury with appropriate instructions.

*Application of the Rule to Negotiable Instruments.*—Most frequently are courts required to pass upon the question of reasonable time, in cases arising from the non-payment of bills and notes; whether or not there has been due diligence in the presentment of bills and notes, payable on a certain number of days after sight or on demand. It is easy to see how difficult it is to lay down any precise rule in relation to this subject. Distance, means of communication and other matters equally outside human control, may each have a bearing upon the question of reasonable time in a given case. Thus it is said in cases of guaranty if the principal fails to pay when he should, the guarantor must be informed of the failure, within a reasonable time; that is, he should be informed soon enough to give him ample opportunity to do what might be necessary to save himself from loss. If the notice were delayed but a short time the guarantor might lose the opportunity of obtaining indemnity, and be damaged, and in consequence be discharged from his obligation. On the other hand, the delay might be for days, months and perhaps years, and yet he might not be injured by the delay, and if it be evident that the guarantor could not have been benefited by earlier notice, he will be held.† In *Mullick v. Radikissen*,‡ it is said the rule of a reasonable time in relation to the presentment of bills and notes, is adopted for want of a better, the law not defining the time precisely when they should be presented, and that the question is a mixed one of law and of fact. In *Bank v. Caverley*, § it was held, that,

\* 15 Me. 350.

† 12 Met. 284.

‡ *Atwood v. Clark*, 2 Greenl. 249.

§ *Hill v. Hobart*, 16 Me. 164; *Ellis v. Thompson*, 3 M. & W. 445.

|| *Holbrook v. Burt*, 22 Pick. 546; *Kingsley v. Wallis*, 14 Me. 57; *Kelsey v. Ross*, 6 Blackf. 356.

\* *Gatling v. Newell*, 9 Ind. 577; See *Hays v. Hays*, 10 Rich. 421.

† *Clark v. Remington*, 11 Met. 361; *Craft v. Isham*, 13 Conn. 28; *Thomas v. Davis*, 14 Pick. 353; *Talbot v. Gay*, 18 Id. 534.

‡ 28 Eng. Law & Eq. 86. See *Mellish v. Rawdon*, 9 Bing. 423.

§ 7 Gray. 217.

## SELECTIONS.

whether a presentment was made in a reasonable time or not, partakes both of law and fact, but in case the facts are uncontradicted it is for the court to determine whether a reasonable time has been exceeded.\* Mr. Byles maintains that what is a reasonable time is a question of law.† Mr. Edwards also says, "the question is one of law to be decided by the court,"‡ and several New York authorities have approved the doctrine.§ In Pennsylvania the cases have not been uniform,|| but they incline to the view, that where the facts are not in dispute, due diligence in communicating the fact of non-payment to the guarantor, is a question of law. Mr. Justice Story takes a somewhat different view, and certainly his opinion is entitled to great respect. In *Wallace v. Argy*, ¶ he makes use of the following language, in speaking of reasonable time: "What that reasonable time is, depends upon the circumstances of each particular case, and no definite rule has as yet been laid down, or indeed can be laid down, to govern all cases. The question is one of fact for the jury, and not of law for the abstract decision of the court. Such, as I take it, is the doctrine of the authorities." This seems to be a better view of the matter, and is based on safe ground. The prevailing doctrine, however, is that the question is a mixed one of law and fact, and if the facts are admitted, or agreed upon, or found by special verdict, the court may decide what is a reasonable time for presentment or notice, otherwise the question should be left to the jury.\*\*

\* *Gilmore v. Wilbur*, 12 Pick. 124; *Holbrook v. Burt*, 22 Id. 555; *Spoer v. Spooner*, *supra*; 1 Dan. Neg. Ins., sec. 466.

† *Byles on Bills*, 163.

‡ *Edw. Bills*, 391.

§ *Mohawk Bank v. Broderick*, 10 Wend. 304; *Gough v. Staats*, 13 Id. 549; *Elting v. Brinkerhoff*, 2 Hall, 459; *Vantrot v. McCulloch*, 2 Hilt. 272 and cases; *Middletown Bank v. Morris*, 28 Barb. 616; *Aymar v. Beers*, 7 Cow. 105.

|| See opinion of Sergeant, J., in *Brenzer v. Wightman*, 7 Watts. & S. 264. also *Bank of Columbia v. Lawrence*, 1 Pet. 578.

¶ 4 Mason, 345. Following opinion expressed in *Muilman v. D'Equino*, 2 H. Bl. 565; *Fry v. Hill*, 7 Taunt. 397; *Straker v. Graham*, 4 M. & W. 721.

\*\* *Chitty Bills*, 369; *Hadduck v. Murray*, 8 Am. Dec. 43; *Nash v. Harrington*, 16 Id. 672; *Gilmore*

*Application to Other Cases.*—The rule of reasonable time is substantially the same in its application to other cases that it is to negotiable instruments, but a reference to a few cases where the question has been decided in particular instances may not be out of place. In *Parker v. Palmer*, † it was left for the jury to say whether the vendee of goods sold by sample had redeemed them within a reasonable time after discovering they did not correspond with the sample. Again, owing to conflicting testimony, it was left to the jury whether the corn was left on the premises a reasonable time for comparison with the whole corn; ‡ and the time in which to sell good after distress; § and when in defence of an action brought for carrying away the plaintiff, against his will, on the defendant's vessel, it was left for the jury to say, whether he had delayed his departure from the vessel an unreasonable time after being warned that she was about to sail. ||

In the following cases reasonable time was held to be a question of law. Where the question was as to the time allowed a tenant at will to remove his family and goods; ¶ as to the time allowed a patentee to file a disclaimer of an improvement included in his patent, of which he does not claim to be the author; \*\* where the question was whether one entitled to claim letters of administration had lost precedence by delay; †† whether the executor of a lessee for life had a reasonable time after his death to remove his goods, where six days time was held reasonable; ‡‡ where the

*v. Wilbur*, 22 Id. 410; *Shute v. Robbins*, 3 C. & P. 80; *Ins. Co. v. Allen*, 11 Mich. 506; *Moose v. Bellows*, 28 Am. Dec. 372; *Sussex Bank v. Baldwin*, 17 N. J. L. 494; *Howe v. Huntington*, 15 Me. 353; *Chambers v. Hill*, 26 Tex. 472; *Nichols v. Blackmore*, 27 Id. 586; *Fernandez v. Lewis*, 1 McCord, 322.

† 4 B. & Ald. 387.

‡ *Facey v. Hendom*, 3 B. & Cr. 21. 3

§ *Pitt v. Shew*, 4 B. & Ald. 208.

|| *Spoer v. Spooner*, 12 Met. 285. For other illustrations, see Wells' "Questions of Law and Fact," 151.

¶ *Ellis v. Page*, 1 Pick. 43.

\*\* *O'Reilly v. Moore*, 15 How. 121; *Seymour v. McCormick*, 9 Id. 106.

†† *Hughes v. Pipkin*, Phil. Law (N. C.), 4.

‡‡ *Stodden v. Harvey*, Cro. Jac. 204.

## SELECTIONS.

maker of a note deposited goods with the holder to be sold to pay it; it was held that a sale several years afterwards was not within a reasonable time.\* In *Doe v. Smith*, it was held a week or a fortnight was a reasonable time, in which to terminate a particular lease and take possession, but a year was not.† The court must decide whether the purchaser of a crate of ware has furnished the vendor with a list of the broken articles in a reasonable time.‡ In legal provocation, what is time "to cool," from the heat of frenzied passion, between the provocation and the inflicting of the mortal blow in return, being a question of law, must be decided by the court, § and so is the question whether a prisoner was tried in a reasonable time after arrest. || — *Central Law Journal*.

## STREET CAR LAW.

In *Germantown Pass. Ry. Co. v. Brophy*, Pennsylvania Supreme Court, January 14, 1884, 14 W. N. Cas., 213, it was held that where a person sits in a street car with his arm resting on a window sill wholly within the car, and by a sudden collision his arm is thrown out and broken, his occupying such a position is not contributory negligence in law. The court said: "The company has two railway tracks, separated by so narrow a space on a curve, that when its cars were passing in different directions they came in collision, whereby the defendant in error, a passenger in one of the cars, was injured. The main contention is whether he was guilty of contributory negligence in producing the injury to his arm. . . . The learned judge charged that if he sat with his arm out of window when the collision occurred, he was guilty of negligence, and could not recover. Not satisfied with this, the

counsel for the company requested the court to charge if the defendant in error placed his arm on the window sill and by a jolt of the car it was thrown out of the window and he was injured, he was guilty of contributory negligence, and could not recover. The court refused to so charge, but left it to the jury to find whether if he was so riding it was negligence on his part which contributed to the injury. The company has no just cause of complaint of this answer. It would have been clear error if the court had instructed the jury that occupying such a position was negligence in law. Resting his arm upon the window-sill wholly within the car, created no legal presumption of negligence. If it constituted negligence, it was a fact to be found by the jury, to whom it was submitted, and it was not to be so declared by the court. In the absence of a collision with an external object his arm was in no danger of injury. He was under no legal obligation to assume or anticipate that the company would run another car against the one in which he was sitting. The window-sill in a railway car is substantially the top of the back of the seat. In cannot be declared negligence in law for a passenger to so rest his arm, and the jury has found it is not negligence in fact." — *Albany Law Journal*.

\* *Porter v. Blood*, 5 Pick. 104.

† 2 T. R. 436.

‡ *Atwood v. Clark*, 2 Greenl. 249. See *Murray v. Smith*, 1 Hawks. 41; *Kingsley v. Wallis*, *supra*.

§ *State v. Sizemon*, 7 Jones Law (N. C.), 208.

|| *Cochran v. Toher*, 14 Minn. 389.

## RECENT ENGLISH PRACTICE CASES—NOTES OF CANADIAN CASES.

## REPORTS.

## RECENT ENGLISH PRACTICE CASES.

## ARMOUR V. WALKER.

*Imp. O. 37, r. 5 (1883)—Ont. r. 285.**Commission to examine witnesses abroad—Witnesses not named in order.*

[C.A.—L.R. 25 Ch. D. 673.]

Application on behalf of the plaintiffs to examine in New York on commission one or more of themselves, and the manager of their firm, and certain American lawyers as to the American law of limited partnership, and generally witnesses whose evidence was material for the trial of the action. CHITTY, J., made the order appointing examiners in New York to take the evidence of witnesses residing at New York, and elsewhere in the United States, and particularly of the plaintiffs and of their manager, and of two American lawyers therein named.

*Held*, now, by the Court of Appeal, the order was in substance right, but should be qualified by directing that the commission was to be executed in New York, and that if the plaintiffs wished to examine any persons other than those named in the order, they must give ten days' notice of their names and addresses to the opposite side.

COTTON, L.J.—In my opinion an order for a commission to examine witnesses abroad ought not to be made unless some reason is shewn why they cannot be examined here, nor unless the Court is also satisfied that there are material witnesses abroad whom the party wishes to examine. It should not be a mere roving commission to give the party a chance of finding evidence abroad. I think that in the present case it is shewn that there are material witnesses, who cannot reasonably be expected to come here unless there is some special reason why their examination should take place in this country. . . . As to the American lawyers it is urged, and, as it seems to me, correctly, that none whose opinion is worth having would come over here; and I think that a sufficient reason for directing a commission to examine American lawyers in America.

LINDLEY, L.J.—I think that all that is required to justify the issuing the commission is that it should be shewn that there are witnesses resident in America whose evidence is material, unless a case is made out why they should be examined here.

FRY, L.J.—I am of the same opinion. \*

\* Cf. *Bingham v. Henry*, 19 C. L. J. 223.

## GILL V. WOODFIN.

*Imp. O. (1875) 29, r. 10—O. 40, r. 11—Ont. r. 211, 322.**Judgment in default of defence—Defence delivered before judgment.*

[L.R. 25 Ch. D. 707.]

A defendant made default in delivering a statement of defence, and the plaintiff gave notice of motion for judgment in default of defence. But before the motion was heard the defendant put in his statement of defence.

*Held*, that the statement of defence, though put in after time, could not be treated as a nullity, and that the plaintiff was not entitled to judgment in default of defence. But as the statement of defence disclosed no real defence to the action, the Court of Appeal ordered the notice of motion to be amended, and judgment to be given for the plaintiff on the admissions in the statement of defence.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

## QUEEN'S BENCH DIVISION.

Rose, J.]

## REGINA V. YOUNG.

*Conviction—Depriving of the use of property—32-33 Vict. cap. 21, sec. 110—Jurisdiction of Magistrate.*

The defendant sold to C., amongst other things, a horse-power and belt, part of his stock in the trade of a butcher, in which he also sold a half interest to C. The horse-power had been hired from one M., and at the time of the sale the term of hiring had not expired. At its expiry M. demanded it, and C. claimed that he had purchased it from defendant. The defendant then employed a man to take it out of the premises where it was kept, and deliver it to M., which he did. The defendant was summarily tried before a Police Magistrate, and convicted of an offence against 32-33 Vict. ch. 21, sec. 110, D.

*Held*, that the conviction was bad, there being no offence against that section, and no jurisdiction in the Police Magistrate to try

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NOTES OF CANADIAN CASES.

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summarily; and that it was bad also in not shewing the time and place of the commission of the offence.

Remarks upon the improper use of the criminal law in aid of civil rights. The conviction was quashed with costs.

*Clements*, for the applicant.

*Holman*, contra.

Rose, J.]

HUGHES ET AL. V. BOYLE ET AL.

*Appeal bond—Discontinuance—Liability of surety.*

The condition of an appeal bond in which the defendant was a surety, was that the appellant would effectually prosecute his appeal and pay such costs and damages as might be awarded in case the judgment appealed from was affirmed. The appellant discontinued the appeal pursuant to R. S. O. cap. 35, sec. 41, which enacts that "thereupon the respondent shall be at once entitled to the costs of and occasioned by the proceedings in appeal, and may either sign judgment for such costs or obtain an order for their payment in the court below, and may take all further proceedings in that court as if no appeal had been brought." The registrar, to whom the matter was referred, assessed the damages at the respondents costs of opposing the appeal.

*Held*, affirming his finding, that the judgment had been affirmed by the discontinuance, and that these costs had been awarded to the respondent by virtue of section 41.

*Quære*, as to the meaning of the expression "effectually prosecute."

*Donovan*, for appeal.

*Millar*, contra.

## CHANCERY DIVISION.

Boyd, C.]

[May 7.]

AMSDEN V. KYLE

*Will—Construction—Election.*

When a testator by his will bequeathed and devised to his nephew J. K., all his real and personal estate subject to the following bequest: "to my wife, E. K. a one-third interest in all my real and personal estate so long as she shall remain unmarried,"

*Held*, that the widow must elect between

the bequest of the will in her benefit and her dower; for although the devise of one-third of the testator's land during widowhood would not *per se* interfere with the widow's right as doweress to claim another third for life, yet the fact that the testator gave his wife a one-third interest in all his real and personal estate as long as she should remain unmarried, imported the same manner of division in the case of the land as in the case of the personalty, viz.: a division of the entire property of each kind, which would be defeated if the dower were first substracted from the reality.

*Re Quimby, Quimby v. Quimby*, 20 C. L. J. 133 followed.

*R. W. Meredith*, for the plaintiffs.

*W. R. Meredith*, Q. C., for the infant defendant.

Boyd, C.]

[May 16.]

RE BARWICK AND LOT 3 ON THE NORTH SIDE OF KING STREET, IN THE CITY OF TORONTO, ON THE PLAN OF THE GAOL AND COURT HOUSE BLOCK.

*Vendors' and Purchasers' Act*, R. S. O. c. 109—*Power to invest—Power to sell.*

A., on his marriage, having conveyed a certain farm, which was then under contract of sale, to the trustee of his marriage settlement, provided that the purchase money, if the sale was carried out, and the land itself if the sale was not carried out, was to be held subject to the trusts of the settlement, as follows:—"And it is hereby agreed by and between the parties hereto, that on the payments of principal being made from time to time by the said J. J. V. (purchaser), the said S. B. H. (trustee), or any other trustee or trustees to be appointed as hereinafter mentioned, shall invest the same in such estate or securities, whether real or personal, and of what nature or kind soever as to him or them shall seem best and most advantageous to the interest of the trust hereby created, and, on such investments being from time to time realized, the same to reinvest in like manner." The settlement also provided that if the said J. J. V. forfeited any right he had to the said real estate it should vest in the trustee for the purposes and uses of the said trusts therein-before mentioned as regards the purchase

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[Prac.]

money, with full power to lease or sell the same, etc.

The purchaser having failed to carry out his purchase, and having relinquished any claim he had to the farm, the trustee subsequently exchanged the farm for a city lot. On an agreement for a sale of the city lot the purchaser declined to accept it, and raised the objection that the trustee had no power under the settlement to sell and convey. On an application by the trustee under the Vendors' and Purchasers' Act R. S. O. c. 109, it was

*Held*, that there was a direction to invest in real estate, and following *Joint Stock Discount Co. v. Brown*, L. R. 3 Eq. 139, that "investing" means the "actual purchase," and the purchaser's objections were overruled with costs.

*Robinson*, Q.C., for vendor.

*McMichael*, Q.C., for purchaser.

Boyd, C.]

[May 16.

BEATTY V. O'CONNOR.

*Action for account—Small balance—Costs.*

In an action by a mortgagor, against the executors of a mortgagee who had sold the mortgaged premises under the power of sale in the mortgage, for an account of the proceeds of the sale a small balance of \$10 was found in his favour. Plaintiff having made certain charges which he failed to substantiate, and not having proved that an account was demanded and withheld from him; and certain special matter pleaded by the defendants being found against them,

*Held*, on further directions, neither party entitled to costs.

*Lennox*, for plaintiff.

*Moss*, Q.C., and *G. W. Lount*, for defendants.

## PRACTICE.

Mr. Dalton, Q.C.]

[May, 23.

PERRY V. PERRY.

*Action on covenant in mortgage—Setting aside service of writ—Ontario Mortgage Act, 1884.*

The plaintiff gave to the defendant a notice of sale under the power of sale in a certain mortgage and also began an action against the

defendant upon the covenant of payment contained in the same mortgage.

The notice of sale was dated 2nd May, the writ was issued on the 3rd May, and both were served on the defendant on the 3rd May. No order was obtained permitting the action to be commenced. Upon motion to set aside the service of the writ as contrary to the provisions of the Ontario Mortgage Act, 1884, 47 Vict. c. 16, O.,

*Held*, that the object of the statute is to prevent all other proceedings while the notice of sale is running and it is not necessary under the statute, to fulfil the very words of it, that one of the acts should be prior to the other.

Service of writ set aside with costs.

*Mulock*, *Tilt*, *Miller* and *Crowther*, for the motion.

*Malloy*, contra.

## LAW STUDENTS' DEPARTMENT.

It may be of interest to students, and the profession generally to know that the number of gentlemen who presented themselves for the recent final examinations were, for Call thirty-three, for Certificate of Fitness thirty-three, of which twenty-three passed for Call, and twenty-four for Certificate of Fitness. We concur in the hope expressed by Cameron, C.J., before whom these young gentlemen were sworn in "that their country will be able to provide them with lots of business without involving itself in a huge lawsuit."

## EXAMINATION QUESTIONS.

FIRST INTERMEDIATE—PASS.

*Equity.*

1. A, by will, bequeaths a fund to the clergy of a certain denomination, in a certain diocese, in such proportions as the Bishop shall appoint; the Bishop fails to make any appointment. Will the clergy take any, and if so, what interest in the fund, and why?

2. What difference is there, so far as the beneficial interest of the devisee is concerned, between a devise of an estate in trust to pay debts of the testator and a devise of an estate charged with payment of the debts of the testator? Explain.

## EXAMINATION QUESTIONS.

3. A trustee conveyed his trust estate to A. who wasted the estate: the *cestui que trust* brought his action against the original trustee to compel him to make good the loss, and the latter defended upon the ground that he had, in good faith, and for the sole purpose of freeing himself from the burthen of his trust, conveyed the said estate to A, who was a person in good standing and had accepted the burthen of the trust, and that he, the original trustee, had, in fact, committed no waste. Who should succeed, and why?

4. A. and B. are both public lecturers; the former enters into a bond to the latter that he will not lecture in Toronto during the present year, and the penalty named in the bond for a breach of the condition is \$1,000; A. afterwards desires to lecture and tenders to B. the amount of the penalty, but B. refuses to accept the money, and brings an action for an injunction to prevent A. lecturing. Should he get the injunction, and why?

5. What different rules have heretofore obtained at law and in equity with respect to the assignment of choses in action?

6. A. and B. enter into a contract whereby the former agrees to loan to the latter the sum of \$1,000 for a specified period, and the latter agrees to accept the same and to pay interest thereon at a specified rate; A. subsequently refuses to advance the money and B. brings an action for specific performance of the contract. What defence, if any, is open to A. upon the facts stated?

7. State the general rules as to the right of appropriation of payments.

*Smith's Common Law.*

1. What obligation is there on the part of the owner of property to those who, at his invitation, come upon that property?

2. Can a farmer who draws in his hay on Sunday be punished for so doing under the Lord's Day Act? Give your reasons.

3. Explain the meaning of a *dormant partner* and a *nominal partner*.

4. Define *particular lien* and *general lien*, and explain the differences between them.

5. What is the law as to the personal liability of an agent upon a contract which he enters into for his principal? Explain fully.

6. In what cases must a bill of exchange be presented for acceptance?

7. Explain briefly the action of *Trover*, and state what effect the plaintiff's recovery in such an action had upon the title to the goods.

*Real Property.*

1. Define Fee-simple, Fee-tail, Estate for life, Estate *pur autre vie*, *Cestui que vie*, Reversion, Remainder.

2. Define Feoffment, Grant, Common recovery, Fine, Livery of seisin.

3. Explain fully the estate by joint tenancy, and distinguish it from a tenancy in common.

4. By what tenure are lands holden in Ontario? Why?

5. What is a bare trustee?

6. Can an infant make a valid conveyance of land? Explain.

7. What is the effect of a grant to A. B. simply—no words of inheritance being used? Explain.

*Anson on Contracts and Statutes.*

1. To what class of contracts does a judgment in an action belong? Mention its characteristics.

2. A. allows bills of exchange to remain in the hands of X., and X. promises to get the bills discounted and to pay the money to A.'s account. Is the promise of X. a binding promise, and why?

3. Give Anson's description of Fraud.

4. Give as fully as you can the effect of partial illegality on the validity of a contract.

5. State the two chief rules of construction which govern the interpretation of a contract.

6. What is meant by *merger* of a contract, and under what circumstances will it take place?

7. What is meant by *acceptance* of a bill of exchange? Is a verbal acceptance binding, and why?

## FIRST INTERMEDIATE.—HONOURS.

*Smith's Common Law.*

1. What presumption of law is there in regard to the life or death of a person?

2. When one person, at the request of another, does an act not apparently illegal, but which is injurious to a third person, what promise may be inferred in law upon the part of the person requesting such act to be done?

3. If a man places a window in his house so as to overlook his neighbour's grounds, what remedy has the latter?

4. Explain the meaning and effect of *abandonment* in the law of insurance?

5. In the case of the death of a person from injuries sustained in a railway accident caused by the negligence of the company, can his administrator ever recover damages *for the benefit of the estate*? If so, under what circumstances.

6. A., in France, draws a bill of exchange on B., who lives in England. The bill is payable in Holland, and is accepted by B., in England. By the

## EXAMINATION QUESTIONS.

law of which country is the obligation of A., and B., respectively governed?

7. Will the following be good secondary evidence of the contents of a written instrument, (a) the evidence of a witness who has read the original, although a copy is in existence, (b) a copy of a copy? Explain.

*Real Property.*

1. Explain the conveyances by bargain and covenant to stand seized. In whose favour may the latter be made?

2. Incorporeal hereditaments were said to lie in grant; corporeal hereditaments, to lie in livery. Explain. What change has been made.

3. A testator declared his intention to be that his son should not sell or dispose of his estate for a longer time than his life, and to that intent he devised the same to his son for life, and after his decease to the heirs of the body of the son. What estate does the son take?

4. If a mortgagor desires to pay off an overdue mortgage, what course must he adopt to compel the mortgagee to receive the money?

5. A devise of a mortgaged estate is made to A. Can A require the executors to pay off the mortgage so that he may enjoy the estate unincumbered? Why?

6. What is the meaning of the term *Emblements*?

7. A testator has duly executed his will which is valid to pass real estate. The will contains a devise of Whiteacre to A. and B. and their heirs. After the will has been made he changes his intention of permitting A. to share in this land, and with that object in view he runs his pen through the words "A. and," and "their," and over the word "their," writes "his." No one is present with him and nothing else is done. What is the effect of this alteration?

*Anson on Contracts.*

1. Indicate some of the consequences of the *peculiar* favour with which the idea of consideration as a necessary element of contract has been treated in *Equity*. Answer as fully as you can.

2. State and exemplify the position of parties who have entered into a contract specified in the fourth section of the Statute of Frauds, but have not complied with its provisions.

3. "The very nature of a corporation imposes some necessary restrictions upon its contractual power, and the terms of its incorporation may impose others." Illustrate what is meant in this quotation by examples.

4. Point out any difference in the rules of Equity respecting the right to rescind contracts entered

into under (a) Undue Influence; and the rules which apply to Fraud.

5. "A contract may be discharged by express agreement that it shall no longer bind either party." Explain this quotation as fully as you can.

6. What are the consequent rights to one party to a contract when the other in the course of the performance of the contract deliberately refuses performance of his part?

7. What is the effect of alteration by addition or erasure of a written contract? Answer fully.

*Equity.*

1. A testator by his will devised his real estate to A., a stranger, in trust, but did not specify any trust upon which it should be held. In whom did the beneficial interest in the estate vest, and why?

2. A. and B. were equal partners, and their warehouse, which was used for partnership purposes, was purchased with partnership funds. A. died intestate, when B. claimed that he and A. held the warehouse as joint tenants, and that he therefore was, as surviving joint tenant, entitled thereto. A.'s heir-at-law claimed a half interest therein as being entitled to all A.'s lands, and A.'s personal representative claimed to be entitled to the benefit of the said half interest as personal estate. On whom did the half interest devolve, and why?

3. A vendor of land before conveyance received a notice from a third person that he has procured an assignment of the purchaser's interest in the contract, and a request that the vendor convey directly to such third person. The vendor disregards the notice and request, and conveys to the original purchaser. What are the rights of the parties and why?

4. State as many as you can of the grounds upon which Equity most frequently refuses to grant specific performance of contracts?

5. "In general in assignments of equitable interests other than equitable estates, he who gives formal notice to the holder of the fund has priority over him who does not." Illustrate this passage by an example.

6. Define legal and equitable assets, and illustrate your answer by an example of each.

7. A. borrows a sum of money from B. and by way of security therefor conveys to him a piece of land by an instrument which upon its face is an absolute conveyance in fee. B. who has oral evidence only of the real nature of the transaction, brings an action to redeem, and A. sets up the Statute of Frauds as a defence. Who should succeed in the action, and why?

## CORRESPONDENCE—ALTERATIONS IN TARIFF.

## CORRESPONDENCE.

## LAW SOCIETY—REWARDS TO STUDENTS.

To the Editor of the LAW JOURNAL:

SIR,—I learn from the *resumé* of the proceedings of the Benchers during Hilary Term, published in your issue of March 15th, that it is proposed, upon economical grounds, to drop the Supreme Court Reports, which cost some \$1,800. I also observe in the estimate of current year's expenditures by the Society the following items:—

Scholarships .....	\$1,600
Medals .....	120
Law School prizes .....	50

In all ..... \$1,770

Now, I suppose the funds of the Society are the common property of its members, of whom the Benchers are trustees, and that they (the Benchers), as in duty bound, are desirous of so administering the funds of the Society as to confer the greatest good upon the greatest number.

If so, I venture to believe, and trust I will be excused for saying, that a very large majority of the members of the profession could much better sustain the loss which will result from the withholding of the sum of \$1,770, now devoted to scholarships, medals, and prizes, than the loss of the Supreme Court Reports.

It is not necessary to aver, as everyone knows, that these awards, as a rule, go neither to the most *needy* or meritorious, but rather to those whose advantages in other respects give them a long start in the race for these distinctions, and render them, when gained, of small pecuniary moment.

While it is usually well known that practitioners struggling in the comparatively outer darkness of the outer counties can ill dispense with light from any quarter, but especially from the highest Court of the Dominion, may I also be permitted to ask, is there any good reason for the rule which withholds from solicitors any report published after they receive their certificates? The fees paid at admission are supposed to cover all reports published for the current year. Why not supply all back numbers of current volumes at cost, and continue them to all upon the rolls alike?

Respectfully yours,

A JUNIOR.

## THE WILL PROBLEM.

To the Editor of the LAW JOURNAL:—

SIR,—If guesses as to solution of the will problem published on page 176 are in order, I submit the inclosed as nearer the intentions of the testator than any yet given.

Let A., B. and C., represent the respective shares of mother, son and daughter, and let C=6 (nearest practical figure); then, as son gets one-third more than daughter (two-thirds as against one-half),

$$B = C + \frac{C}{3} = 8.$$

The mother gets half as much as the son, or as much as the daughter. To average this, and give the share as against two instead of one, we have

$$\frac{B}{2} + C$$

$$A = \frac{\quad}{2} = 5,$$

making mother's share  $\frac{1}{2}$ ; son's,  $\frac{1}{3}$ ; and daughter's,  $\frac{1}{6}$ .

Yours, etc.,

S.

## ALTERATIONS IN TARIFF.

The following amendments in the tariff were issued on March 29th, 1884. The first item is a little ambiguous, and it seems doubtful whether it is intended to supersede the appeal to the Judge in Chambers under Rule 449, or whether it is to be concurrent therewith, or what the precise intention is. Then the charge made by item 11, which amends item 115 previously existing, is curious, inasmuch as it apparently takes away from the taxing officer all discretion in allowance of counsel fees for the attendances referred to. We especially, however, call attention to item 16, which introduces a decided novelty in numbering. What the precise effect of calling an item "165½" may be, is hard to anticipate. The following are the new regulations:—

Saturday, 29th March, 1884.

It is ordered that the tariff of fees made by the Judges of the Supreme Court of Judicature of Ontario on the 10th day of September, 1881, be amended as follows:

1. There may be an appeal by appointment without other notice from the taxing officer in Toronto to the Master in Chambers, or to the Master in Ordinary, pending the taxation in all cases.
2. Item 12 in the said tariff is struck out.
3. Item 23 in the said tariff is struck out, and the following is substituted therefor:

"23. To amend any pleading when the amendment is proper, \$2.00."

## ALTERATIONS IN TARIFF.

4. Under the heading "Drawing Pleadings," &c., after item 46, and as applicable to items 36 to 46 inclusive, add "In special or contested actions or matters, to be increased to such sum as the taxing officer in Toronto may think fit."

5. Item 83 in the said tariff is struck out, and the following substituted therefor:

"83. Notice of Motion in Court or Chambers, engrossing and copy to serve per folio, 30 cents."

6. Under the heading "Perusals," item 91 in the said tariff is struck out, and the following substituted therefor:

"91. Of each of the pleadings as defined by the Act, \$1.00."

7. Item 93 in the said tariff is struck out, and the following substituted therefor:

"93. And in special or contested actions or matters, or of interrogatories and cross interrogatories on commission such sum as the taxing officer in Toronto thinks fit."

8. Under the heading "Attendances," item 96 in the said tariff is struck out, and the following substituted therefor:

"96. Necessary attendances consequent on the service of a notice to produce or admit, or an inspection of documents when produced under order including making admission altogether, \$1.00."

9. Item 100 in the said tariff is struck out.

10. Item 111 in the said tariff is struck out, and the following substituted therefor:

"111. Attendance on warrant or appointment of Master, Registrar, Examiner, or Referee, per hour, \$1.00."

11. Item 115 in the said tariff is struck out, and the following substituted therefor:

"115. On important points and matters requiring the attendance of counsel the Master, or Examiner or Referee, Judgment Clerk, or Inspector of Titles may certify the amount of counsel fee proper to be allowed (to be noted at the time), for the guidance of the taxing officer in Toronto, who may allow the same in lieu of fees for attendance."

12. Under the heading "Court Fees (Term Fees)," item 120 in the said tariff is struck out, and the following substituted therefor:

"120. Fee after statement or where statement dispensed with after filing writ, on defence, joinder of issue, trial or argument before Courts, or any other step in the cause, and on judgments other than præcipe judgments in mortgage cases. No two fees to be allowed either party when such proceedings are taken or had between the first day of any sittings of the Courts fixed by Rule 480, and the first day of the following sittings so fixed, \$1.00."

13. Item 122 in the said tariff is hereby struck out, and the following substituted therefor:

"122. On every order or judgment, \$1.00."

14. Under the heading "Judgment, Rules or Orders," item 133 in the said tariff is struck out, and the following substituted therefor:

"133. Drawing minutes of judgment or order per folio when prepared by solicitor under directions of Registrar or Judgment Clerk, 20 cents."

15. Item 135 in the said tariff is struck out, and the following substituted therefor:

"135. Attending for appointment to settle or pass judgment or order of Court, copy and service, \$1.30."

16. Under heading "Sales by Master or Auctioneer," after item 145 add:

"145½. Each necessary attendance on printer, 50 cents."

17. Under heading "Miscellaneous," after item 153 add:

"In special matters, to be increased in the discretion of the taxing officer in Toronto."

18. Under the heading "Counsel Fees," items 165 and 166 in the said tariff are struck out; and Order 539 is rescinded, and the following is substituted therefor:

"165. On argument in Chambers in cases proper for the attendance of Counsel, (to be increased in the discretion of the Master in Chambers or the Master in Ordinary), \$2.00."

19. The necessary letters and attendances incurred in obtaining the decision of the taxing officer in Toronto, shall be allowed as part of the costs of the cause.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for May 24th and May 31st, contain Scotland in the Eighteenth Century, *Scottish Review*; Salvini, *National Review*; Luther and Recent Criticism and The Arundel Society, *Nineteenth Century*; The Ballad of the Midnight Sun, *Contemporary*; Personal Recollections of Leopold, Duke of Albany, *Fortnightly*; Old Mortality, *Longman's*; City Churches, *Saturday Review*; Chinese Paleontology, and On the Formation of Starch in Leaves, *Nature*; Poisonous Reptiles and Insects of India, *All the Year Round*; Welbeck Abbey, *Forestry*; Letters of Charles Lamb, *Athenæum*; with instalments of "The Baby's Grandmother," "Beauty and the Beast," and "Virginia," the conclusion of "Bourgonef," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price (\$8) is low; while for \$10.50 the publishers offer to send any one of the American \$4, monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



OSGOODE HALL.

HILARY TERM, 47 Vict., 1884.

During this term the following gentlemen were called to the bar, namely:—

Messrs. James Bicknell, gold medalist and with honours; George Walker Marsh; Donald Cliff Ross, John Young Cruikshank, Edward James Hearn, Wilmott Churchill Livingston, Robert Walter Witherspoon, George Frederick Cairns, Francis Stewart Wallbridge, Moses McFadden, Frederick Augustus Munson, Daniel Urquhart, Edward Guss Porter, James Burdett, Alexander Monro Grier, Edmund Champion, John James MacLaren. The last three being under Rules in special Cases.

And the following gentlemen were admitted into the Society as Students-at-Law, namely:—

Matriculants — John Frederick Gregory, William Edward Kelly, William Wesley Dingman, John Hind Hegler.

Junior Class — Michael H. Ludwig, Franklin Smoke, John B. McColl, Robert Wilson Gladstone Dalton, James Joseph McPhillips, Frederick Rohleder, Patrick Kernan Halpin, John Wesley Coe.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- 1884  
and  
1885.
- Arithmetic.
  - Euclid, Bb. I., II., and III.
  - English Grammar and Composition.
  - English History—Queen Anne to George III.
  - Modern Geography—North America and Europe.
  - Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## or NATURAL PHILOSOPHY.

*Books*—Arnot's elements of Physics, and Somerville's Physical Geography.

## FIRST INTERMEDIATE.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

## FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

## FOR CALL.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## FEES.

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

*Copies of Rules can be obtained from Messrs. Rowse & Hutcheson.*

# Canada Law Journal.

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JUNE 16, 1884.

NO. 12.

## DIARY FOR JUNE.

- 17. Tues...Burton and Patterson, J. J., C., A., sworn in.
- 18. Wed...Earl Dalhousie, Governor-General, 1820.
- 20. Fri...Accession of Queen Victoria.
- 21. Sat...Galt, J., sworn in C. P., 1869.
- 22. Sun...2nd Sunday after Trinity.
- 23. Mon...Hudson's Bay Territory transferred to Dominion, 1870.
- 25. Sat...Queen Victoria crowned, 1837.
- 26. Sun...3rd Sunday after Trinity.
- 30. Mon...John B. Robinson, Lieut.-Governor, Ont., 1880.

TORONTO, JUNE 16, 1884.

MR. W. C. UPPER, Barrister-at-Law, has been appointed Judge of the County Court of the county of Haldimand, and local Judge of the High Court of Justice in the place of His Honour Judge Stevenson resigned.

THE *Canada Gazette* announces the appointment of Mr. Robert Smith, Q.C., of Stratford, as Deputy Judge of the County of Perth. It was stated that he was to be a puisne judge of the Queen's Bench of Manitoba. This appointment would have reflected credit on the Government. He is probably one of the best lawyers west of Toronto, and his character stands very high both in his public and private relations.

MR. J. A. MACDONELL, having, as he supposed, a grievance against Mr. Muelock, M.P., and Mr. Edward Blake, M.P., in that they drew the attention of Parliament to the apparent extravagance of certain bills of costs rendered by him for services as agent of the Minister of Justice, with a curious want of logic and thoughtless haste rushed into print and assailed *not* either of these members of Parliament, but the

brother of one of them, making a charge against him of unprofessional conduct. This charge seemed, to most men, to bear absurdity on the face of it, but was immediately seized upon by malicious persons to hold up to contempt the supposed delinquent, who, however, took no notice of this unprovoked attack, but, when the proper time came, met it with a simple explanation, which showed the charge to be "utterly groundless."

Without, so far as appears, asking for one word of explanation, and without making reasonable efforts to ascertain the truth of the charge, Mr. Macdonell published this charge against a brother professional man in a public newspaper, and sent a copy of his letter to the Treasurer of the Law Society, and also applied to the Court of Chancery for a rule to show cause why Mr. S. H. Blake should not be struck off the rolls. The material for this motion was, we understand, very inadequate, but was not discussed, as the Chancellor suggested that as an application had been made to the Law Society the matter should stand over. To this tribunal Mr. Macdonell should, of course, have gone in the first instance.

The complaint was taken before Convocation in the same incomplete manner. The following proceedings there took place:

At a meeting of Convocation of the Law Society, held 19th May, 1884, it was

Moved by Hector Cameron, Q.C., seconded by Mr. MacLennan, Q.C., and carried

That while Convocation condemns as highly improper the publication in the newspapers by Mr. J. A. Macdonell of the charge he has made against Mr. S. H. Blake, which he intended to bring before Convocation, yet as a grave charge is made

## MACDONELL V. BLAKE—COSTS OF SOLICITOR AND COUNSEL ACTING IN PERSON.

by the communication laid before Convocation by the treasurer, Mr. Macdonell be informed that he must submit the charge indicated by him to Convocation in a formal shape in writing, with such verification as he thinks fit, before any action can be taken thereon.

At a meeting of Convocation held 27th May, 1884, it was

Moved by Mr. Murray, seconded by Mr. MacKelcan, and carried—

That Convocation is of the opinion that the charge of Mr. Macdonell against Mr. S. H. Blake is of such a character that it should be and is hereby referred to the Committee on Discipline, to investigate and to report thereon to Convocation.

At a meeting of Convocation, held on 7th of June,

The Committee on Discipline, to whom the complaint of Mr. Macdonell against Mr. Blake was referred for consideration, beg to report to Convocation that they notified these gentlemen to appear before them with their evidence, and that they appeared accordingly. Your committee heard the evidence adduced, considered the matter, and unanimously find that the complaint in question was utterly groundless, and that no case of professional or other misconduct has been made out against Mr. Blake.

The report was adopted.

Moved by Mr. L. W. Smith, seconded by Mr. James Bethune, Q.C., and carried,

That inasmuch as garbled statements of the proceedings before the Discipline Committee in the matter of the charges made against the Honourable S. H. Blake, seriously affecting that gentleman's position and standing, have found their way into the public press, the secretary be authorized to furnish such of the papers as may desire to publish an authentic statement of the facts a copy of the report of the committee as adopted by Convocation.

We do not know whether the Benchers propose to take any further action in the premises, but it certainly seems only reasonable when one member of the Bar is wantonly assailed and publicly libelled as a disgrace to his cloth by another member, and the charge is shown to be false, that the latter should be visited with the same punishment that he has sought to inflict on the former.

If the charge had been made to the governing body of the Law Society in the

first instance, and under different circumstances, we would have commended even misconceived and intemperate zeal for the honour of our profession; but it is difficult to believe that this was the motive that prompted the action taken.

The result of this fiasco is not merely that an innocent person has been wronged, but the whole profession has also been more or less brought into disrepute. We can fancy that Mr. S. H. Blake is not much troubled about the matter; it is the Bar that is most concerned.

It is possible that Mr. Macdonell may have been, from improper motives, wrongfully charged with presenting outrageous and excessive bills of costs. There was one simple way of setting himself right in this respect, and of showing to the world that Mr. Mulock and Mr. Edward Blake had wantonly assailed his professional reputation, and that was to have his bills of costs taxed by the proper officer. This does not seem to have occurred to him; but it is not too late even now to take this course; when this has been done the blame will rest on the right shoulders.

## COSTS OF SOLICITOR AND COUNSEL ACTING IN PERSON.

The question as to the right of a solicitor suing or defending in person to recover profit costs was recently before the English Queen's Bench Division in the case of *London Scottish Permanent Benefit Society v. Chorley*, 12 Q. B. D. 452, 50 L. T. N. S. 265, in which the right was contested, and the Court (composed of Denman, Manisty, and Williams, J.J.) unanimously held that the solicitor had the right to recover such costs. The same point was also up before Hagarty, C.J., not long ago in *King v. Moyer* 9 P. R. 514, when the same conclusion was arrived at. Indeed, so long ago as *Smith v. Graham*, 2 U. C. R. 268 this

## COSTS OF SOLICITOR AND COUNSEL ACTING IN PERSON.

point was decided in favour of an attorney in this Province. While a solicitor acting in person is thus assured of his right to recover profit costs, it seems somewhat anomalous that a barrister acting in person should not also be entitled to recover for professional services rendered in his own behalf, and yet it seems equally settled by the authorities, as they at present stand, that he cannot. In *Smith v. Graham*, 2 U. C. R. 268, it was laid down that a counsel acting in person cannot recover any fee for his services from the opposite party, and the same rule was re-affirmed by the Queen's Bench in *Re North Victoria Election*, 39 U. C. R. 147; but in *Henderson v. Comer*, 3 U. C. L. J. 29, it was held that this rule did not prevent the recovery of a counsel fee, where the partner of one of the litigants acts as counsel.

In *London Scottish Permanent Benefit Society v. Chorley*, it was argued that costs are only allowed by way of indemnity for expenses incurred; that in fact "costs" mean "what it has cost," and a dictum of Bramwell, B., to that effect in *Harrold v. Smith*, 5 H. N. 381, was relied on. Denman, J., however, was of opinion that "the word 'costs' may well apply and include a fair indemnity for the labour and skill a solicitor has had to bestow upon his own case, and which, if he had not conducted his own case, he would have had to pay another solicitor for. His time is valuable, and he bestows his labour and skill as a solicitor when prosecuting or defending a claim in person. Hence 'costs' may fairly include an indemnity for work done by him which would have had to be done by another solicitor supposing he had not done it himself."

If, for the word "solicitor" in this passage, we substitute the word "barrister," it is plain that the reason upon which the right of a solicitor acting in person to recover profit costs is based, would apply

with equal cogency to the claim of a barrister acting in person to recover for his services.

Every suitor may perform for himself, if he is able, the professional work which is ordinarily transacted by solicitors, and he may also, if he is able, perform for himself the duty of an advocate. It is, generally speaking, only because non-professional suitors have not the ability to conduct their own causes that they find it to their interest to entrust them to professional lawyers; but while a non-professional suitor may act for himself, he cannot act either as attorney, or counsel, for any other person. In this respect there is no distinction whatever between the two branches of the profession.

In one point of view it might be said that attorneys' and solicitors' fees are based upon the principle that they are intended as a recompense for services rendered as an attorney, and that as no man can act as attorney, except for somebody else than himself, the fees of an attorney cannot be said to be earned when he is not acting as an attorney, but in his own person, and on his own behalf. But Mr. Justice Manisty, we think, very properly laid down the rule that a solicitor acting in person is entitled to recover profit costs because he is a solicitor.

A non-professional person acting in person is not entitled to recover solicitor's fees, even though he discharge duties ordinarily discharged by a solicitor, because he is not a solicitor. The right to recover those fees depends, not merely on the performance of the particular services for which they are provided as a remuneration, but on the person by whom they are performed; the person discharging them, whether acting in person or for another, must be a practising solicitor.

The same line of argument, it seems to us, may properly be adopted with regard to counsel fees. A counsel conducting his

## COSTS OF COUNSEL AND SOLICITOR ACTING IN PERSON—OUR ENGLISH LETTER.

own case in person should be allowed for his services so rendered, because he is a practising barrister.

What can be said in favour of a solicitor's right to profit costs which cannot be as equally strongly urged in favour of counsel's?

The fees of both solicitors and counsel are, in this Province, regulated by tariff, and it has been held that counsel may apply against their clients for an order for taxation of their fees, with a view to enforcing payment thereof in the same manner as a solicitor, *Re C. K. & C.*, 6 P. R. 227. In the old case of *Baldwin v. Montgomery*, 1 U. C. R. 283, it was even held that counsel might sue his client for the recovery of fees taxed under the tariff (and see *McDougall v. Campbell*, 41 U. C. Q. B. 337, affirmed 14 L. J. N. S. 213). But in the latter case the Court held that when the counsel was retained by the attorney he could not sue the client. The English cases are, however, opposed to any action lying for counsel fees, see *Kennedy v. Broun*, 13 C. B. N. S. 677, *Mostyn v. Mostyn*, L. R. 5 Chy. 457, because in England they persist in clinging to the theory that a counsel fee is in the nature of an honorarium, and that its payment is merely of moral and not legal obligation. In this Province there are indications that this somewhat poetical notion is out of date, and yet some traces of it still linger in the air. The sooner it is done away with altogether the sooner we shall have reached the region of common sense in this matter. In the present day, in this Province, a barrister's fee is not an honorarium, it is the taxable price of certain professional services. What is the use therefore of pretending it is something which everyone knows it is not. The only merit the theory appears to possess is that it affords counsel a convenient protection from liability for negligence in conducting cases. Whether this im-

munity from liability, even for gross negligence, is altogether reasonable, or can in the present day be maintained, at all events in this Province, we will not at present stop to discuss. (See *per Adam Wilson, J.*, *Leslie v. Ball*, 23 U. C. Q. B. 512.)

In *Re C. K. & C.* 6 P. R. 227, Blake, V. C., said, "I am not at all prepared to perpetuate the old idea, that the fees payable to counsel are a mere honorarium, and therefore cannot be recovered by suit or other proceedings;" and Harrison, C. J., rather dolefully remarked in *Re North Victoria Election* case, that if the old rule which affirmed that the fee paid to counsel was a mere honorarium he was sorry to admit "little, if anything, remains except the shell." Considering the "old rule" has thus so nearly disappeared it is a pity that its "shell" should not be also consigned to the limbo towards which the poor old rule has made such progress. We should hope that if the question should ever come before an Appellate Court for consideration that the Court may find itself able to lay down the same rule regarding counsel acting in person, as has been established regarding solicitors so acting.

## OUR ENGLISH LETTER.

(From our own Correspondent.)

LEGAL business is still at a low ebb. The great men of the profession such as Messieurs Charles Russell, Horace Davey and Webster are doing well and so are some of the Junior Bar who are specialists. Mr. Moulton, for instance, has reaped such a harvest of scientific cases out of the Patents Act and Electric Lighting Act that he has deemed it advisable to apply for the honour of a silk gown. But the great mass of the Junior Bar and a considerable number of Queen's Counsel suffer grievously from lack of occupation.

## OUR ENGLISH LETTER.

One source of this is, undoubtedly, to be traced to the prevailing depression in trade, but there are other causes at work. The public, and especially the shop-owning public, is showing a marked preference for arbitrations as compared with legal proceedings, and a large proportion of these arbitrations are conducted without professional advice or assistance. One cannot blame them even from a professional point of view, for it is merely futile to expect men to enter into actions at law when the expense of keeping the witnesses waiting for trial alone is often greater than the amount of the subject of dispute. This view is not original but comes from the lips of a practical ship-owner who is a member Parliament, and a man who has considerable experience in litigation. Another cause is to be found in the unrighteous severity of the taxing masters who seize every possible opportunity of disallowing the costs of two counsel. The result is that solicitors naturally incline to employ but one barrister wherever it is possible, and the consequence of that is that business is not righteously distributed. There is another effect produced, which Pearson J., animadverted upon yesterday in discussing the case of *Llanover v. Homfray*. The effect is that leading counsel cannot do their work honestly or properly, and junior counsel cannot learn their business in a practical manner. It is not too strong to say that in every solicitor's office there is a strong and proper feeling of indignation at the parsimonious spirit in which the rules are administered. Besides this, it is only fair to add that both the New Rules and the Bankruptcy Act have combined to render litigation an indulgence visited with heavy penalties which especially fall upon the shoulders of practitioners. It is not long since a solicitor was heard to remark that, if he had only had no business, he would have been a rich instead of a poor man.

Mrs Weldon and Mr. Bradlaugh have set an example to suitors which is being largely followed. Of the former, mention has been made before; she has considerably impaired her reputation both as an advocate and a sane woman by certain actions which she has appeared in of late, and by her public conduct. There is nothing absolutely disreputable in appearing at a music hall as a performer, but it is not the sort of conduct that commends itself to the judgment of society as indicative of prudent and ladylike taste. Mr. Bradlaugh has another action coming on soon. Whether he will be represented by counsel or no is unknown, but it is a notorious saying that upon points of law he prefers to use his own judgment, but when a vast array of facts is to be marshalled he likes to make use of a trained legal intellect. This is not complimentary to the English Bar, but it must be admitted that the litigious member for Northampton has been very successful of late. The worst and latest example of the practice of appearing in person is a gentleman of the name of Stanbury who wears his hair long, tied with a ribbon, or passed through a gold ring, and is reported to have brought an unsuccessful action against his father for slander in describing him as a hopeless lunatic. He babbles in the Divisional Court periodically, but no one has yet been able to recognize his present aim, unless it be to suffer the martyrdom of a committal for contempt. As to the original cause of action, most people are of opinion that, apart from all questions of privilege, a father is more likely than any one else to form a correct estimate of the intellectual capacities of a son. Moreover, there is every evidence to show that the judgment was justly formed as well as tersely expressed.

Two important cases have been decided of late. In *Bird v. Lord Greville* Mr. Justice Field applied the old established

## OUR ENGLISH LETTER—PROVINCIAL STATUTES OF LAST SESSION.

principle that, in a contract for the letting of a furnished house there is an implied warranty that the house is let for human habitation. The concrete example which called forth the law from its home amongst the reports was that of a landlord who deliberately concealed the fact that the house he attempted to let was infected with measles. In these days of sanitary science, we may expect to see a wide application of the principle. *Johnson v. Mudford* is a wonderful instance of the perversity which British Juries will sometimes show. The coroner for Canterbury misbehaved himself grossly, and the *Kentish Observer* ventures to comment upon this august official in severe terms. The result was an action for libel in which the Lord Chief Justice virtually directed a verdict for the defendant by summing up strongly in his favour; but the British reverence for authority was too strong and twelve good men and true returned a verdict for the plaintiff. In this finding there was a deplorable absence of common sense, and new trial may be regarded as a moral certainty.

A good deal of preliminary nonsense was written and talked concerning the case of Lord St. Leonards who was tried yesterday at the Central Criminal Court for the vulgar offence of an indecent assault. It was said, even by competent lawyers, that he might have claimed to be tried before his peers. But the journals, in general, seem to have been visited with a torrent of letters informing them that they had made a mistake and they very soon changed front. The trial itself was supremely interesting from the name of the accused and the misfortune of his position. If there is one class of cases which more than any other cries aloud for the passing of a law to enable prisoners to be examined as witnesses, it was to be found here. There could be but two witnesses to a disgusting transaction; the mouth of one was closed

and that of the other was open. Beyond this it was proved that the prosecutrix was, or had been, unchaste; yet, to the profound amazement of the whole court, her evidence was believed and the prisoner was found guilty. Now the evidence of a chaste woman is always believed, and it is the obvious conclusion that, if all juries were like the puritanical twelve men who sat at the Old Bailey yesterday, no man would be safe against an accusation of this kind. In fact, M. Max O'Rell, in his inimical book *John Bull et Son Ile*, reckons the chances of such an accusation as the chief danger of British society.

Canadian lawyers are not free from the danger of foreign invasions, though they have no reason to fear competition. A correspondent of the *Law Times* writes to ask what formalities must be gone through by a *Docteur en Droit Francaise* who has practised as an advocate in Paris, before he can appear in the courts of Quebec and Montreal. Unless this good gentleman has domestic reasons for wishing to leave France and to go to Canada he will be well-advised if he remains at home and measures his talents against those of his own countrymen.

### PROVINCIAL STATUTES OF LAST SESSION.

We propose to call our readers' attention to such of the enactments of last session as are of special importance to the practising lawyer. In this view chapter 4 being an Act for the amendment of the Election Law, and for the better prevention of corrupt and illegal practices at elections to the Legislative Assembly, first requires a brief mention. This act is to be read as part of the Election Act, R. S. O. c. 10, and the Controverted Election Act, R. S. O. c. 11. It commences by further defining what shall constitute corrupt practices, and amongst other things pro-

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vides in section 3, that any candidate or other person who for the purpose of influencing an election, makes a bet or wager on the result thereof, in the electoral district or any part thereof, or on any event or contingency relating thereto, shall be guilty of corrupt practice. It also contains a great number of amendments of, and substitutions for, several specified sections of the principal acts, and in section 39 enacts that where an election court reports that any persons named therein have been guilty of corrupt or illegal practices it shall be the duty of the County Attorney to prosecute such persons for the offences mentioned; and lastly, in section 48, declares that it has been, and is the policy of the Election Law, and the intention and meaning of the several statutes in that behalf, that no election was, or is, void for any irregularity on the part of the returning officer, unless it appears to the tribunal having cognizance of the question that the irregularity affected the result of the election; and that no candidate or other person is disqualified or subject to any disability or penalty for any corrupt practice, without the concurrent judgment to that effect of the two judges by whom the election petition is tried; and that, in case of an election being set aside and a new election had, to the same Legislative Assembly or otherwise, the new election cannot be avoided by setting up corrupt practices by the candidate in or during the former election, or affecting the same, which were not set up and proved at the former trial, and so adjudged by the two judges at the former trial, or by the Court of Appeal before the subsequent election, as by law to involve such disqualification, disability or penalty.

Chapter 9 makes certain amendments in the Division Courts Act, R. S. O. c. 47, in relation to garnishee proceedings, where the garnishees are a body corporate, providing for the issue of the garnishing sum-

mons, and for the service thereof on an agent of the corporate body in question.

Chapter 10 is intituled an Act for further improving the administration of the law, and may be cited as "The Administration of Justice Act, 1884," and is to be construed as part of the Ontario Judicature Act, 1881. Sec. 2 repeals sec. 29 of the Creditors Relief Act, 1880, 43 Vict. c. 10, which provided that that Act should not come into force until a day to be named by proclamation, and provides for its coming into force forthwith. Sec. 3, adds certain words to R. S. O. c. 118, sec. 2, relating to fraudulent preferences, producing apparently this result:—that a gift, conveyance, etc., made by an insolvent debtor with intent to defeat or delay his creditors, or give one or more of them a preference over the others, will not be null and void under that section, unless thereby "such one or more of the creditors of such persons *would* obtain a preference over his other creditors, or over any one or more of such creditors." Secs. 9, 10, relate principally to interpleader in the Division Courts. Sec. 9 gives an appeal to the Court of Appeal from the decision of a Division Court Judge upon an application for a new trial, where the value of the goods and chattels interpleaded about or the proceeds thereof exceed \$100; and *in all actions in which the parties consent to the appeal*, subject to the regulations as to appeals to the Court of Appeal contained in the Division Court Act, 1880, 43 Vict., c. 8. Sec. 10 provides that either party to an interpleader issue in a Division Court may require a jury to be summoned to try it. Sec. 11 brings us to the Judicature Act, providing that the Board of County Judges appointed under R. S. O. c. 47, sec. 238, may frame a County Court tariff of costs, which shall be certified to the Judges authorized to make rules under secs. 54 or 55 of the Judicature Act, who may approve, disallow, or amend any such

## PROVINCIAL STATUTES OF LAST SESSION.

tariff. Sec. 12 provides that any Judge of the High Court of Justice or any County Court Judge may order witnesses to be examined in relation to any matter pending before a foreign tribunal, where it appears that a commission for the taking of such testimony has been duly issued by order of any court or tribunal of competent jurisdiction in such foreign country. This portion of the Act would appear to be *in eadem materia* with the Dominion Statute, 31 Vict. c. 76, and may have been suggested by the doubts cast upon the constitutionality of the latter Act in *re Wetherell & Jones*, 4 O. R. 713. Lastly, secs. 13 and 14 makes certain alterations in the tariff of Sheriff's fees.

Chapter 11 is an Act respecting the distribution of estates of which the Attorney-General is administrator or trustee, under R. S. O. c. 60, and provides that the provisions of R. S. O. c. 107, s. 34, as amended by 46 Vict. c. 9, s. 1, relating to the notice to claimants required to be given by executors and administrators, and assignees for creditors, in order to exonerate the latter from liability in administering the assets, or proceeds of the trust estate, shall apply to the Attorney-General where he is such administrator as aforesaid; and after such notice the Attorney-General may forthwith pay any money remaining in his hands unclaimed into the consolidated revenue fund of Ontario, notwithstanding the ten years' limit provided for in R. S. O. c. 60, s. 8, or may pay the same over under direction of the Lieutenant-Governor in Council, pursuant to s. 6 of the last mentioned Act, and no claim can afterwards be made against the Province in respect of moneys so paid over under s. 6.

We have next to notice chapter 16, being an Act respecting proceedings on Mortgages, on which there has already been a decision in *Perry v. Perry*, noted in the last number of this Journal at p. 210, where it is decided that it is not necessary in order

to come within the statute, that the notice of sale should be served prior to the other proceedings being commenced. In that case a notice of sale and a writ in an action on the covenant were served the same day. The object of the Act is stated to be to prevent the making of unnecessary and vexatious costs in respect of mortgages. It then provides that, where a demand for payment or a notice of sale under the powers in a mortgage, has been made or given, "no further proceedings at law or in equity, and no suit or action either to enforce such mortgage, or with respect to any clause, covenant, or provision, therein contained, or the lands or any part thereof, thereby mortgaged shall, until after the lapse of the time at or after which, according to such demand or notice, payment of said money is to be made, or said power of sale is to be exercised or proceeded under, be commenced or taken, unless or until an order permitting the same, shall first be had and obtained, either from the Judge or any County Court or from any Judge of the High Court." This is not to apply to proceedings to stay waste or other injury to the mortgaged premises. It would seem, however, that to enable a mortgagee to commence proceedings in ejectment concurrently with the exercise of the power of sale, an order will have to be obtained under this Act. Sec. 3 enacts that "when any such demand or notice requires payment of all moneys secured to be paid by or under a mortgage, the party making such demand or giving such notice, shall accept and receive payment of the same, if made, as required by the terms of such notice or demand," thus apparently preventing any such question as arose in *Cruso v. Bond*, 1 O. R. 384.

Chapter 17 is our old friend, the Act for protecting the public interest in Rivers, Streams and Creeks, with an important alteration as to the fixing of tolls. Sec. 4 takes away the function of fixing the

## PROVINCIAL STATUTES OF LAST SESSION.

amount of tolls which persons entitled to tolls under the Act shall be allowed to charge, from the Lieutenant-Governor in Council, and places it in the hands of the County Judge, or the Stipendiary Magistrate of the Judicial District, subject to a right of appeal under sec. 6 to a judge of the Court of Appeal, which right is to be exercised within fifteen days from the judgment or order of the judge or stipendiary magistrate.

Chapter 18 makes certain amendments in the Mechanics' Lien Acts. Sec. 1 amends R. S. O. c. 120, s. 3, by providing that the "express agreement" which shall exclude a mechanics' lien, must be an express agreement "signed by" the mechanic. Sec. 2 provides that among the particulars required to be stated in the registered statement of claim for a mechanic's lien, must be "the date of the expiry of the period of credit agreed to by the lien-holder for payment for his work, materials or machinery, when credit has been given," otherwise the lien shall cease to exist after 90 days, unless proceedings have been instituted, notwithstanding such period of credit. Sec. 3 would appear to have been suggested by the case of *Grant v. Dunn*, 3 O. R. 876, where it was held, that where one claimed a mechanic's lien in respect of materials furnished, by virtue of an assignment from the original furnisher thereof, the affidavit of verification required by R. S. O. c. 120, sec. 4, subs. 2, must be made by the assignor. This decision seems modified by the section now under consideration, which provides that the affidavit of verification may be made by "any agent or assignee of the person entitled to the lien, having full knowledge of the facts required to be verified." Sec. 6 confines the benefits of a suit brought by a lien-holder to all lien-holders of the same class, "who shall have registered their liens before or within 30 days after the commencement

of such suit, or who shall, within the said 30 days, file in the office from which the writ issued a statement of their respective claims."

Chapter 19 is the most important Act of last session, being An Act respecting the property of Married Women, which may be said to be a verbatim adoption of the English Married Women's Property Act, 1882, though, strange to say, our legislature has not thought fit to acknowledge in any way on the face of the act, the source from which it is derived. In respect to this act, we cannot do better than refer our readers to an interesting article published from the *Times* in this journal, vol. xviii, p. 330. Sec. 2, subs. 1, provides that "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. Sec. 2, subs. 3, alters a leading presumption of law, by enacting that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shewn." Secs. 3 and 5 provide that every woman married after the commencement of the Act, July 1st, 1884, shall hold her property, howsoever derived, as her separate property which she can dispose of in manner aforesaid. Sec. 17 saves existing and future settlements from the provisions of this Act. Sec. 11 provides that every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue

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the other for a tort. Sec. 13 provides that a husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, and for wrongs committed by her after marriage, to the extent of all property whatsoever belonging to his wife, which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bona fide* recovered against him in any proceedings at law in respect of any such debts, interests, or wrongs, for or in respect of which his wife is liable. One important difference, however, there appears to be between our and the English Act in respect to criminal proceedings, as between husband and wife. The English Act goes so far as to allow to the wife criminal remedies against the husband, and conversely to allow to the husband criminal remedies against the wife, in regard to acts done by the one against the property of the other, though it excepts the case where husband and wife are living together. (See Imp. 45-46 Vict. c. 75, secs. 12 and 16.) Our legislature appears to have left criminal remedies alone, nor does it appear to give the husband reciprocal remedies against the wife for wrongs committed by her against his property. Sec. 22 repeals the Married Woman's Property Act, R. S. O. c. 125, save as to rights already acquired thereunder. In conclusion, we can scarcely do better than reproduce the concluding remarks from the article in the *Times* already alluded to: "The Act probably portends indirect social effects, much greater than the disposition of property, and it may in the end pulverize some ideas which have been the basis of English life. Measures which affect the family economy are apt to be 'epoch making'; and probably when the most talked of

bills of the session are clean forgotten, this measure may be bearing fruit."

Chapter 20 is an Act to secure to wives and children the benefit of life insurance, the most important section being sec. 5, which provides that in case a policy of insurance effected by a married man on his life, is expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or in case he has heretofore endorsed, or may hereafter endorse, or by any writing identifying the policy by its number or otherwise, has made, or may hereafter make, a declaration that the policy is for the benefit of his wife, or of his wife and children, or any of them, such policy shall enure, and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the intent so expressed or declared, and so long as any object of the trust remains the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable; but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration.

Chapter 21 extends the time within which proceedings may be taken under the Masters and Servants Act, R. S. O. c. 133, to one month after the last instalment of wages under the agreement of hiring has become due, though this may be more than one month after the engagement or employment has ceased.

Chapter 29 is an Act respecting Building Societies, and is important in that connection though its provisions do not admit of mention here.

Chapter 30 is intituled, "The Railway Amendment Act, 1884," and deals with rights and liabilities of railway companies in connection with mines. Sec. 2 would seem, perhaps, to have been suggested by

## PROVINCIAL STATUTES OF LAST SESSION—WARRANTIES BY AGENTS IN SALES.

the recent cases of *Jenkins v. The Central Ontario*, 4 O. R. 593, wherein it was held that the expropriation clauses of the General Railway Act, enabled railway companies to acquire the fee of the land, in this country, and not merely the right of way, as may be the case in England. Sec. 2 now provides that "The Company shall not be entitled to any mines of iron, slate, or other minerals under any land purchased by them except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless named therein and conveyed thereby." The remainder of the act is taken up with provisions relating to the working of the mines.

Chapter 32 is the Municipal Amendment Act, 1884, but its enactments do not require to be specially called attention to here. Sec. 13 may, however, be referred to as containing several alterations in the provisions of the Consolidated Municipal Act, 1883, 46 Vic. c. 18, s. 496, relating to the matters in respect to which by-laws may be passed.

Chapter 39, an Act for the protection of persons employed in factories is a matter of philanthropic rather than legal interest.

## SELECTIONS.

## WARRANTIES BY AGENTS IN SALES.

The subject of implied powers of agents is always an interesting one. The late English decision in *Brooks v. Hassall*,\* to the effect that a servant entrusted with the sale of a horse at a fair is authorized to warrant his soundness, re-opens the much agitated question as to the authority of agents to warrant their principle's goods. The leading case upon the subject of horse sales is *Brady v. Todd*,† in which a distinction is attempted to be drawn between sales in which the power to warrant is implied, and those where it can not exist without express authority. It was held that the agent of a private owner entrusted to sell and deliver a horse on one particular occasion, is not by law authorized to bind his master by a warranty; and that the buyer who takes a warranty from such an agent takes it at the risk of being able to prove that he had the principal's authority. It had been held in *Howard v. Sheard*,‡ that the agent of a horse-dealer has implied authority to make a warranty; and the purchaser's right to sue is not affected by the fact that the servant was expressly forbidden to warrant the horse.

The distinction is based upon the theory that when one engages in trade, and commissions another to act for him, he thereby clothes such general agent with power to act as he himself would probably act in the like case; and since it is customary to warrant property sold in the ordinary course of trade to be sound, when a sound price is paid, the purchaser may assume that the agent has authority to so warrant. But where the servant is authorized to act in one particular instance for one who is seeking to dispose of a horse theretofore employed by him for his private purposes,

\* Reported in 49 L. T. (N. S.) 569; 18 Cent. L. J. 118. See *Alexander v. Gibson*, 2 Camp. 555, in which the same doctrine is maintained by Lord Ellenborough. See also *Helyear v. Hawke*, 5 Esp. 72; *Fenn v. Harrison*, 3 T. R. 760, 761.

† 9 C. B. (N. S.) 592.

‡ L. R. 2 C. P. 148.

## WARRANTIES BY AGENTS IN SALES.

there can be no such implication; the very fact that a private owner is making such disposition should put him on his guard.

The Supreme Court of Vermont in *Deming v. Chase*,\* qualifies the doctrines of *Brady v. Todd*, and recognizes it only when the servant has been expressly forbidden to warrant the horse, and if the principal has said nothing in regard thereto, the servant has the same authority, as in general sales. We seriously question the logic of this decision. If the agent has authority to sell when nothing is said to him, the law permits the purchaser to presume that he has such authority, but if he has secretly forbidden him, the purchaser buys at his peril. It is the well settled rule of law that secret instructions to agents having apparently full authority are ineffectual, and, if the servant has this implied authority, the protection of the purchaser should not be subject to the absence or existence of private instructions. The court should have followed *Brady v. Todd*, as an entirety, or repudiated it. We fail to see any consistency in its position.†

But *Brady v. Todd* has been followed as an entirety in New Jersey.‡ "A sale of a chattle," said Dixon, J., "is a transfer of its title for a price. A direction to sell, therefore, nothing more appearing, would confer upon a special agent no authority beyond that of agreeing with the purchaser in regards to the component particulars. Under certain circumstances a sale imports more than these particulars; . . . but in the sale of a horse subject to the buyer's inspection, no warranty of quality is implied, and it seems a clear deduction that, in an authority to sell, no authority so to warrant is implied. The warranty is outside of the sale, and he who is empowered to make the warranty must have some other power than that to sell."

There are four fundamental principles

\* 48 Vt. 382.

† See *Milburn v. Belloni*, 34 Barb. 607; *Tice v. Gallup*, 2 Hun. 46; s. c., 5 S. C. 51. This distinction seems to be followed in *Gaines v. McKinley*, 1 Ala. 446, citing *Story's Agency*, 59, 97, 122. Also in *Skinner v. Gunn*, 9 Porter's Rep. 305; *Bradford v. Bush*, 10 Ala. 390; *Cocke v. Campbell*, 13 Ala. 286.

‡ *Cooley v. Perrine*, 41 N. J. L. 322; *Scott v. McGrath*, 7 Barb. 53, also supports *Brady v. Todd*.

of the law of agency, underlying this subject. (1) One who deals with an agent is bound, at his peril, to ascertain the extent of his authority.\* (2) The law implies in favour of agents whether the agency is limited to one or more objects, the right to use the usual and appropriate means to accomplish the objects of the agency; but not unlimited power to use such means as they deem proper.† (3) The implied authority of an agent is limited by the usual course of dealing as respects that particular agency, or agencies, of that character in general.‡ (4) Where such implied authority is defined by law, no secret instructions to the agent, not brought home to the knowledge of the party contracting with the agent can affect his rights.

With those principles governing them many courts have betrayed no hesitation in declaring that "authority without restriction, to an agent to sell, carries with it authority to warrant."§ But the tendency of the latest authorities is to restrict the power to warrant to those cases where it is customary to warrant,|| and the burden of proof is upon the purchaser to show that such warranty is usual.¶

Under this doctrine, a sale of a safe does not imply a power to warrant that

\* *Gullett v. Lewis*, 3 Stew. 23; *Fisher v. Campbell*, 9 Port. 210; *Van Eppes v. Smith*, 21 Ala. 317; *Powell v. Henry*, 27 Ala. 612; *Smith v. Carr*, 16 Conn. 455; *White v. Langdon*, 30 Vt. 599; *Sprague v. Train*, 34 Vt. 150; *Goodrich v. Tracy*, 43 Vt. 314.

† *The Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 51; *Benjamin v. Benjamin*, 15 Conn. 356.

‡ *Jones v. Warner*, 11 Conn. 48; *U. S. Life Insurance Co. v. Advance Co.*, 80 Ill. 549.

§ *Schuchardt v. Allens*, 1 Wall. 359, 369; *Nelson v. Cowing*, 6 Hill, 336; *Boothley v. Scales*, 27 Wis. 626, 635; *Cocke v. Campbell*, 13 Ala. 286. See *Taggart v. Stanberry*, 2 McLean R. 543; *Peters v. Fransworth*, 15 Vt. 155; *Cornfoote v. Fowks*, 6 M. & W. 358. But see, *Lipscomb v. Kittrell*, 11 Hump. 256, 260. Cf. *Woodford v. Glenahan*, 4 Gilman, (Ill.) 85; *Blackman v. Charlestown*, 42 N. H. 132; *Williamson v. Canaday*, 3 Ired. 349; *Franklin v. Ezell*, 1 Sneed. (Tenn.) 497; *Ezell v. Franklin*, 2 Id. 236; *Dayton v. Hooglin*, S. C. Ohio, Feb. 5, 1884; 5 Ohio L. J. 142.

|| *Herring v. Skaggs*, 62 Ala. 180; citing *McCreary v. Slaughter*, 57 Ala.; *Smith v. Tracy*, 36 N. Y. 79, 82; *Lansing v. Coleman*, 58 Barb. 611; *Lossie v. Williams*, 6 Lans. 228; *Scott v. McGrath*, 7 Barb. 53. See *Murray v. Smith*, 4 Daly, 277; *Gibson v. Colt*, 7 Johns. 390.

¶ *Herring v. Skaggs*, 62 Ala. 180.

## WARRANTIES BY AGENTS IN SALES.

it is fire or burglar proof;\* nor has a broker implied authority to warrant bank stocks sold by him;† nor has a servant in a sale of liquors, the power to warrant that they are not subject to seizure for prior violation of the revenue laws.‡ Nor can a commission merchant warrant that flour shall remain sweet during a sea voyage; his power, at the most, is to warrant its sweetness at the time of sale.§ Nor has an agent to sell a note authority to warrant that it shall be paid at maturity.||

But an agent employed to sell a note may warrant it to be business paper.¶ So, an agent engaged in selling harvesters has authority to warrant them.\*\* And it is safe to state that a manufacturer of machines is bound by the warranties of his selling agents, even though he forbade them to warrant them. And when an agent is entrusted with a sample, no other inference can be drawn except that he has authority to warrant the bulk to be equal to the sample.†† So one having authority to sell and convey land to another may warrant against the lawful claims of all persons claiming under his principal.‡‡ But an agent with a mere power to sell land can bind his principal by no representations as to the quality or quantity of the land.§§

Where there is such implied authority, it makes no difference that there was a custom for agents not to warrant goods of the same character unless knowledge of the custom is brought home to the purchaser.||| And *vice versa* it has been held that a broker of merchandise has no authority to warrant and that a general custom of brokers to warrant all their sales can-

not be recognized.\* But custom may regulate the character of the warranty. Thus, in *Dingle v. Hare*,† a warranty in a sale of guano, that it contained 30 per cent. of phosphate of best quality was binding upon the principal, it being found by the jury that it was customary to make such a warranty in the sale of these manures.

Auctioneers cannot warrant the quality of goods sold by them without special authority.‡ They are only special agents and have only authority to sell. Auction sales in the usual mode are never understood to be accompanied by a warranty and, therefore, they have no power to give any unless specially instructed to do so.§ And it is well to remember that a warranty by an agent is never binding upon his principal, unless it be made at the time of the sale as an inducement thereto. Therefore if the servant after the sale gives the purchaser a receipt for the price and therein the first mention is made of the warranty, the principal can not be held thereon.||

Whether if a principal receiving the proceeds of a sale without knowledge of the warranty, thereby ratifies the warranty, and, if he does not return the proceeds upon becoming cognizant of the fact, does thereby assume the same liability as if authority had been originally given, has been a question much controverted. On the one hand, it is asserted that the agent having no authority by law to make the warranty, it was the purchaser's duty to inquire of the principal, and having failed to do that he must retain what the law gives him; that if he believed that the agent had authority to warrant, it was either a mistake of law, or a mistake of fact, brought about by his own neglect, from the effects of either of which the law can not relieve him; that he has received all that the principal contemplated, and what he should have known was all the law guaranteed him; and that he cannot

\* *Herring v. Skaggs*, 62 Ala. 180.

† *Smith v. Tracy*, 36 N. Y. 79, 82.

‡ *Palmer v. Hatch*, 46 Mo. 585.

§ *Upton v. Suffolk County Mills*, 11 Cush. 586. The latter part of this proposition is maintained in *Randall v. Kehlor*, 60 Me. 47.

¶ *Graul v. Strutzel*, 53 Iowa, 712. *Examine Anderson v. Bruner*, 112 Mass. 14.

\*\* *Ahern v. Goodspeed*, 72 N. Y. 108, 114.

†† *McCormick v. Kelly*, 28 Minn. 135; *Murray v. Brooks*, 41 Iowa, 45.

‡‡ *Boothby v. Scales*, 27 Wis. 626.

§§ *Schuchardt v. Allens*, 1 Wall. 359, 369; *Andrews v. Kneeland*, 6 Conn. 355; *Monte Allegro*, 9 Wheat. 616, 644; *Murray v. Smith*, 4 Daly, 277.

|| *Ward v. Bartholemew*, 6 Pick. 409; *Backman v. Charlestown*, 42 N. H. 131, 132.

||| *National Iron Co. v. Baxter*, 4 C. E. Green (N. J.) 331.

\* *Murray v. Brooks*, 41 Iowa, 45 in which there was a sale of a reaping machine, and such a custom existed.

† *Dodd v. Farlow*, 11 Allen, 426.

‡ *C. B. N. S.* 145; 29 L. J. C. P. 223.

§ *Monte Allegro*, 9 Wheat. 616, 647, *Blood v. French*, 9 Gray, 197.

|| See *Skrine v. Elmore*, 2 Camp. 407; *Woodin v. Burford*, 2 C. & M. 391.

## WARRANTIES BY AGENTS IN SALES—MOSES v. SIMPSON.

demand that the principal shall undo what he himself has done, or require him to answer for the unauthorized act of his agent.\*

On the other hand, it is urged that if he adopts the act of the agent in part, he must adopt it *in toto*, and by electing to retain the proceeds he ratifies every means by which those proceeds were secured; that he has enabled his agent to perpetrate a fraud upon an innocent person, and he must, therefore, place the latter in *statu quo*, or become accountable to him for the methods, by which he was relieved of his money. We see more reasoning in the former arguments than in the latter, while an impulsive conclusion would recognize the greater justice of the latter position.†  
—*Central Law Journal*.

## REPORTS.

## ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

## COUNTY COURT OF SIMCOE.

## MOSES v. SIMPSON.

*Right to trial by jury.*

In Common Law cases, the parties to the suit are entitled to have a jury, and they should not be deprived of this right under the powers given by R. S. O., cap. 50, sec. 255, except strong grounds are shewn.

[Barrie.

The plaintiff's claim was on a note, and the defendant resisted payment on the ground that he gave the note to the plaintiff with the understanding that his wife was to join in it, otherwise the money would not be advanced to him and the note would be returned; that his wife refused to sign the note, and consequently he could not obtain the money on it, yet the plaintiff retained the note and insisted on payment.

The defendant gave notice for a jury, and the

\* *Croom v. Swan*, 1 Fla. 211; *Graul v. Strutzel*, 53 Iowa, 712; See *Cooley v. Perrine*, 41 N. J. Law, 322, 331; *Coombs v. Scott*, 12 Allen, 493; *Smith v. Tracy*, 36 N. Y. 79; *Gulick v. Gover*, 33 N. J. L. 463.

† *Lane v. Dudley*, 2 Murphey, 119; *Coleman v. Riches*, 29 Eng. L. & Eq. 326; See *Helyear v. Hawke*, 5 Esp. 72; *Eadie v. Ashborough*, 44 Iowa, 519.

plaintiff now moved to strike out the notice on the following grounds:—

1st.—The plaintiff is a foreigner not well acquainted with the English language, and he fears from this cause his conduct in the box as a witness, on his own behalf, will appear to the jury as unwillingness on his part to tell the truth.

2nd.—That the plaintiff is a Jew, and he fears the jury will be prejudiced against him on this account.

3rd.—That the note bears fifteen per cent. interest, and the jury may consider the rate extortionate and be prejudiced against him on this ground also.

*Strathy*, for plaintiff.

*Pepler*, for defendant.

Boys. J. J.—The action may be called a purely Common Law one, and consequently following the decisions in *re Martin*, L. R. 20 Chy. D. 365; *Wedgeburn v. Pickering*, L. R. 13 Chy. D. 771, and *Bank of British North America v. Eddy*, 9 P. R., 468, either party is entitled to have a jury; as Jessel, M. R. calls it, it is a Common Law right and ought not to be taken away without good cause, the *onus* being on the party asking to have the jury notice struck out. If there are special grounds rendering it desirable to try the action before a judge without a jury, then, and then only, should an application such as this be granted. Are there such special grounds shewn in this case? It seems to me there are not. I do not think there is any prejudice in this country against foreigners, nor can I believe that if the plaintiff hesitates in the witness box owing to his imperfect knowledge of the English language, that this will set the jury against him. Happily, in this country, his being a Jew will not be against him, and I fear the rate of fifteen per cent. interest on an unsecured note is too common an occurrence to attract much attention. All these grounds are too slight to call for the exercise of that discretion which judges have, under cap. 50, sec. 255, R. S. O., in this connection.

When actions are brought against corporations this discretion has been often exercised, owing to the well-known inclinations of juries to give such bodies scant justice: See *McGunninghal v. G. T. R. Co.*, 6 Pr. R. 209; *Nelles v. G. T. R. Co.*, 13 L. J. N. S. 199; *Morris v. City of Ottawa*, 13 L. J. N. S. 200; but in the face of the English cases cited and the decision of *Boyd, C.*, in *Bank of British North America v. Eddy*, following them, I do not feel that, in the present case, I should exercise my discretion in the manner asked for. If after a fair trial there is reason to believe the plaintiff's fears have been realized, a new trial will probably be granted and without a jury.

The summons must be dismissed with costs in the cause to the defendant in any event.

Q. B. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div

**NOTES OF CANADIAN CASES.**PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.**QUEEN'S BENCH DIVISION.**—  
IN BANCO.**WALMSLEY V. MITCHELL.***Seduction—Verdict for defendant—No costs.*

Where in seduction it is shewn that the injury in question is to some extent due to the plaintiff's wrongful conduct, and the jury find in favour of defendant, with the expression of a wish, however, that he should have no costs, the Court held that there was good ground under Rule 428, for withholding costs.

*Osler, Q.C., for application.*—  
**HYMAN V. BROWN.***Chattel mortgage—Omission to register—Assignment for creditors—Adding third party.*

W. gave chattel mortgage to plaintiff, and then assigned to defendant for creditors. The mortgage was not registered, and plaintiff, on refusal by defendant to deliver the goods to them, sued defendant, who then applied to have one M., a creditor of W., made a defendant, so as to question the mortgage. This was done, but the Court held the order bad, for when plaintiff demanded the goods, creditors had no right, and they could not by a subsequent assent make good their claim under the assignment.

*H. J. Scott, for appeal.**Gibbons and Aylesworth, contra.***CHANCERY DIVISION.**

Boyd, C.]

[April 2.]

**CARNEGIE V. FEDERAL BANK.***Pleading—Admissions—Master's office—Pledge of stock—Ear-mark—Identification of pledged stock.*

By his statement of claim in this action the plaintiff set forth that during April and May, 1878, the Federal Bank lent money to him, and

on April 23rd, 1878, he gave the bank, as security, assignments of Ontario Bank stock, and of Bank of Commerce stock; that soon after the making of this loan the defendants sold the Bank of Commerce stock and credited the proceeds; that the defendants did not hold the Ontario Bank's share during the currency of the loan, but soon after the making of it, disposed of that stock without notice to the plaintiff, and by such sales received more than enough to pay off the balance, and the plaintiff asked for an account.

Upon this pleading the parties went to trial upon admissions, shewing that the Ontario Bank stock in question was in the hands of the defendants at the date of the loan, April 23rd, 1878.

In the Master's Office it was discovered, and for the first time brought to the recollection of both parties, that the Ontario Bank shares in question had been pledged by the plaintiff with the bank some months previously on another loan, and had been carried forward to the loan of April 23rd, and, on this state of facts, an issue was raised in the Master's Office as to whether the bank actually did hold the shares on that day, the plaintiff contending that it had previously parted with them and was therefore liable to be charged with their market value as of that day. The master held that the pleadings precluded him from going behind April 23rd.

*Held*, on appeal, that the master had rightly decided, for the admissions, which were evidence for all purposes in the Master's Office, could not be inferentially or argumentatively countervailed by detached parts of contradictory evidence going to shew that the defendants had previously disposed of 160 shares of the Ontario Bank stock, and were in default at the date of the loan—April 23rd. What the plaintiff was now seeking was to place the parties in this position: the plaintiff was induced to accept a loan from the bank on the representation that the bank had stock security for that loan in their hands, whereas, in fact, that security had been already sold, and the bank was indebted to the plaintiff for the proceeds of that stock, and should account on that footing. This was a very different state of facts from what was spread on the record, and disclosed a different cause of action.

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[Prac.

*Held*, also, that inasmuch as it appeared in the evidence that the defendants had at all times at least 160 shares of Ontario Bank stock credited to their account in the books of the Ontario Bank, and inasmuch as the Ontario Bank shares from time to time transferred by the defendants were not identified or earmarked in such a way as necessarily to lead to the conclusion that only the *residuum* after deducting these could be treated as the plaintiff's share, it could not be considered proved that the defendants had not 160 shares applicable to the plaintiff's loan on April 23rd, 1878.

*J. R. Roaf*, for appeal.

*Cattanach*, contra.

Cameron, J.]

[May 1.

#### NIXON V. ASHBENHURST.

*Dower—Will—Election—Express provisions in will in lieu of dower.*

Although where the question to be tried in an action for dower is whether the plaintiff has elected to take the provisions made for her by her husband's will in preference to dower, the evidence adduced might not have been sufficient to establish such election in the absence of a distinct declaration in the will that the provisions thereof are in lieu of dower; yet, where a will in express terms makes provision for the testator's wife in lieu of dower, thus bringing directly to her mind that she cannot have dower and the provision of the will also, the same evidence might suffice to establish such election. Much less dealing with what is left her, will evidence an election on the widow's part in such a case, than would be sufficient where the sole question was whether she had elected to take the provisions made for her by the will, where such provisions according to the principles of equity would be inconsistent with an intention on the part of the testator to let her have such provisions and dower also.

*Coleman v. Glanville*, 18 Q. R. 42; *Cooper v. Watson*, 23 U. C. R. 345; *Baker v. Baker*, 25 U. C. R. 448, distinguished.

#### PRACTICE.

Rose, J.]

[April 29.

#### RE FRIENDLY V. NEEDLER.

*Division Court—Prohibition—Discretion.*

A. entered a notice disputing plaintiff's claim in a Division Court suit, and objecting to the jurisdiction of the Court, but did not appear at the trial when the junior judge of the county of York, upon proof of the plaintiff's claim, and such facts as in the absence of proof to the contrary, established a *prima facie* case of jurisdiction, entered a judgment in favour of the plaintiff for \$44.75. On motion for prohibition on the ground of want of jurisdiction,

*Held*, following *Archibald v. Bushey* 7 P. R. 304, that the granting of prohibition under the circumstances was discretionary, that it would be unfair to place upon the judge trying the case the burden of cross-examining the witnesses to ascertain jurisdiction, that if a *prima facie* case of jurisdiction is made out the defendant is himself to blame if it is not displaced, and as neither a good defence on the merits was shewn, nor despatch used in making the application, the motion was refused with costs.

*Walter Read*, for the motion.

*Hands*, contra.

Rose, J.]

[May 30.

#### RE YOUNG V. MORDEN.

*Division Court—Prohibition—Increased jurisdiction.*

In an action in the 9th Division Court of the county of Hastings, on a promissory note for \$200 and interest, the learned judge who tried the case (the junior judge of the county) entered judgment for \$200—the amount of the note—\$7.17 accrued interest, and costs.

*Held*, on a motion for prohibition, that the wording of the statute is clear, viz., all claims for the recovery of debt or money demand the amount or balance of which does not exceed \$200, and the motion was granted.

*McCracken v. Creswick* 8 P. R. 501, and *Widmeyer v. McMahon* 32 U. C. C. P. 187, referred to and distinguished,

*Held*, also, That as the learned judge who tried the case does not allow County Court

Prac.]

NOTES OF CANADIAN CASES—OBITUARY.

costs in similar cases, and as the plaintiff was obliged to sue in the Division Court at the risk of prohibition, or in the County Court, and lose his costs, that the defendant should get no costs of this motion, unless he successfully resists the suit to be subsequently brought to recover the amount of the note.

*Shepley*, for the motion.

*Aylesworth*, contra.

Rose, J.]

[June 3.]

HILLIER v. ARTHUR.

*Sitting aside judgment at trial—Rule 270, O.J.A.*

The plaintiff, not appearing at the trial which took place at the Picton Assizes before PATTERSON, J.A., judgment was directed to be entered for the defendant with costs.

Application was subsequently made to the learned judge at the same assizes to set aside the judgment, and reinstate the case on the list. This was refused, the plaintiff not being then ready to go on. Application was then made by the plaintiff to the Master in Chambers under Rule 270, O. J. A., to set aside the judgment entered at the trial. This motion was enlarged before Rose, J. in Chambers, who

*Held* that Rule 270, O. J. A., does not give jurisdiction to the Master or a Judge in Chambers.

*Clement*, for the motion.

*Aylesworth*, contra.

The Master in Chambers.]

[June 3.]

RE FITZGERALD, A SOLICITOR.

*Bills of costs—Delivery and taxation—Præcipe order.*

Upon a motion in chambers for an order for the delivery and taxation of a solicitor's bills of costs, relating to certain proceedings under mortgage,

*Held*, that the Chancery practice of obtaining such orders on *præcipe* is the more convenient one, and should prevail in all divisions of the High Court of Justice.

Order made with costs as of a *præcipe* order.

*Holman*, for the motion.

*Clement*, contra.

## OBITUARY.

HON. JOHN GODFREY SPRAGGE.

On the 1st of May last we recorded the death of the late Chief Justice of the Court of Appeal, and now fulfil our promise of a brief sketch of the prominent phases in the life of this distinguished judge.

John Godfrey Spragge was born in England on the 16th September, 1806, at Newcross, in the county of Surrey, and came to Canada with his father's family in 1820. He attended the school of the late Bishop Strachan, until he began the study of law in the office of the late Sir James B. Macaulay. He was also for a short period in the office of the late Hon. Robert Baldwin. After having been called to the bar he soon enjoyed a large practice as a special pleader, and as the business of the office of Master in Chancery was small, and did not interfere with his general business, he accepted that office in 1837. He was also a Benchman, and for several years Treasurer of the Law Society.

In December, 1850, he was appointed Vice Chancellor of Upper Canada, and in December, 1869, Chancellor of Ontario, and retained that position until the 25th April, 1881, when he was promoted to the position he occupied at the time of his death, and which he attained owing to the lamented death in comparative youthfulness of Chief Justice Thomas Moss, one of the most brilliant and promising judges that ever adorned the Bench in this or any other country.

Chief Justice Spragge at the time of his death, on the 20th April last, had held judicial rank for thirty-three years and upwards. For his work and qualities as a judge reference is made to the reports of the respective courts over which he presided. It would be superfluous to attempt to add anything to what has already been recorded in these pages with respect to the late Chief Justice Spragge, by the Law Society, at a meeting of the members which took place on the 22nd of April last, nor to the touching allusion to him by his eminent brother, Chief Justice Hagarty, in his address to the grand jury, in the April court, on the previous day. But we may say that whilst his learning was great, his keen discernment of facts in cases before him was a remarkable feature of his judicial usefulness. To the Bar he was a model of courtesy, and his relations with those who came in contact with him in the many years

## CORRESPONDENCE—FLOTSAM AND JETSAM.

he was in public life were of the most pleasant character.

It may not here be inappropriate in recognition of the deserts of those judges who have survived his late Lordship, and with whom he so faithfully and harmoniously served his Sovereign, and of others yet to occupy a seat on our solid and unsullied Bench, to add to this communication the closing words of the speech of Lord Dufferin, uttered on the occasion of a dinner given by him to the judges of the Supreme Court of Canada, at Government House, at Ottawa, on the 18th Nov., 1875, as follows:—

"That, inasmuch as pure, efficient, and authoritative courts of justice are the most precious possessions a people can. enjoy, the very founts and sources of a healthy national existence, there is no duty more incumbent on a great and generous community than to take care that all and every one of those who administer justice in the land are accorded a social, moral, and, I will venture to add, a material recognition proportionate to their arduous labours, weighty responsibility, and august position."

## CORRESPONDENCE.

## EWART ON COSTS.

*To the Editor of the LAW JOURNAL.*

DEAR SIR,—I have to thank you for calling my attention to an advertisement of the existence of which I was unaware.

I refer to that which asserts that Mr. J. H. Thom had consented to revise the "Manual of Costs" lately issued. Shortly after the work was commenced, I asked Mr. Thom if he would be kind enough to look over the proof sheets for me, and he at once assented. I offered to pay him a fee for his work, but he declined it, deeming it better while in office not to receive money for such matters. When sending the MSS. to Mr. Cassells, I told him of this arrangement and received a reply that Mr. Thom had no recollection of having entered into it. The advertisement had at this time been running for some months, and I had never had any intimation from Mr. Thom of the existence of any misunderstanding. I cannot imagine how it occurred. I now offer all the recompense in my power. I have instructed the

publishers to return his money to any purchaser who has been misled and desires to cancel his purchase.

Your obedient servant,

JOHN S. EWART.

## FLOTSAM AND JETSAM.

CLERK of the Court: "Owen Doherty! are you Owen Doherty?" Prisoner with a merry twinkle in his eye: "Yes, begorra, i'm owin' everybody!"

A CORRESPONDENT of the *Pall Mall Gazette*, sends to that paper the following account of what happened the other day in Queensland: "A Chinaman had to give his evidence, and was asked how he would be sworn. His reply was, 'me no care; clack 'im saucer, kill 'im cock, blow out 'im machee, smell 'im book, allee samee.' He was allowed to 'smell 'im book.'"

A STORY illustrative of the craze in Chicago for entering the plea of self-defence: Three men quarrelled in a room above a saloon, when one of them fell dead from heart disease. The others were fearful that they would be charged with murder, so one went to the saloon and enticed the bartender out, while the other carried the corpse down and placed it in a chair with its head on a table as if sleeping off a drunk. When the bartender returned, the two men took a drink, saying the drunken man in the chair would pay for it, and went away. The bartender soon shook his customer and demanded his pay. The corpse fell over on the floor, and, as the bartender stood trembling with fear, the two men returned with an officer. The bartender anticipating his arrest, quickly said: "He struck me first."

Curious comments by a judge, even in the presence of a prisoner, though extremely rare, are not unprecedented. Mr. Justice Maule once addressed a phenomenon of innocence in a smock frock in the following words: "Prisoner at the bar, your counsel thinks you innocent; the counsel for the prosecution thinks you innocent: I think you innocent. But a jury of your countrymen, in the exercise of such common sense as they possess, which does not seem to be much, have found you 'guilty,' and it remains that I should pass upon you the sentence of the law. That sentence is that you be kept in imprisonment for one day, and, as that day was yesterday, you may go about your business." The unfortunate rustic, rather scared, went about his business, but thought that law was an uncommonly puzzling business.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

HILARY TERM, 47 Vict., 1884.

During this term the following gentlemen were called to the bar, namely:—

Messrs. James Bicknell, gold medalist and with honours; George Walker Marsh; Donald Cliff Ross, John Young Cruikshank, Edward James Hearn, Wilmott Churchill Livingston, Robert Walter Witherspoon, George Frederick Cairns, Francis Stewart Wallbridge, Moses McFadden, Frederick Augustus Munson, Daniel Urquhart, Edward Guss Porter, James Burdett, Alexander Monro Grier, Edmund Champion, John James Mac-laren. The last three being under Rules in special Cases.

And the following gentlemen were admitted into the Society as Students-at-Law, namely:—

Matriculants — John Frederick Gregory, William Edward Kelly, William Wesley Dingman, John Hind Hegler.

Junior Class — Michael H. Ludwig, Franklin Smoke, John B. McColl, Robert Wilson Gladstone Dalton, James Joseph McPhillips, Frederick Rohleder, Patrick Kernan Halpin, John Wesley Coe.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- 1884 and 1885.
- Arithmetic.
  - Euclid, Bb. I., II., and III.
  - English Grammar and Composition.
  - English History—Queen Anne to George III.
  - Modern Geography—North America and Europe.
  - Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb, I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar.

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## or NATURAL PHILOSOPHY.

*Books*—Arnett's elements of Physics, and Somerville's Physical Geography.

## FIRST INTERMEDIATE.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

## FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

## FOR CALL.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness, and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchor, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## FEES.

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

*Copies of Rules can be obtained from Messrs. Rousell & Hutcheson.*

# Canada Law Journal.

VOL. XX.

JULY 1, 1884.

No. 13.

## DIARY FOR JULY.

1. Tues....Dominion Day: 1867. Long Vacation, H. C. J., commences.
6. Sun.....5th Sunday after Trinity.
7. Mon....Col. Simcoe, 1st Lieut.-Gov. U. C., 1792 County Court and Surrogate Terms (ex York).
8. Tues....Cyprus ceded to England, 1878.
11. Fri.....Canada invaded by U. S., 1813.
12. Sat.....County Court and Surrogate Term (except York) end.
13. Sun.....5th Sunday after Trinity.
14. Mon....W. P. Howland, 1st Lieut.-Gov. of Ontario, 1868.

TORONTO, JULY 1, 1884.

WE learn from the *Law Times* that a brilliant assemblage dined at the Mansion House in London last month, as guests of the Lord Mayor to meet the judges. The Master of the Rolls, we are told, said some things worthy of meditation. One was that he was opposed to decentralization of the Courts of law. He would keep the judges in the Metropolis. He is undoubtedly right, and we are glad to see he takes this ground. Decentralization tends to the ruin of both Bench and Bar. He also warned people against a too ready surrender of trial by jury, and discouraged the craze for cheap law brought to any man's door.

THE decision of the English Queen's Bench Division in *London Scottish Permanent Benefit Society v. Chorby*, to which we referred in our last issue, has, we see by a late number of the *Law Times*, been affirmed by the Court of Appeal. The Master of the Rolls laying down the rule that in such cases costs are not to be taxed which the union of the two characters of party and solicitor renders impossible, *e.g.*, instructing, attending, or advising himself. The *Times* observes:—

"It would be an interesting question whether this rule would be held applicable to members of the other branch of the profession litigating in person."

As we desire to be perfectly fair and accurate in any statement we make, especially when the conduct of a professional man is concerned, we would refer again to the charges made by Mr. Macdonell which were recently the subject of discussion in Parliament. In our remarks on the subject it was suggested that he should have the bills "taxed by the proper officer." We do not wish it to be understood that the bills were not taxed at all. It was stated during the discussion in Parliament (see *Hansard*, 1416,) that the bills were taxed by Mr. Small, then an officer of the Queen's Bench, but it also appeared that they were not taxed by Mr. Thom, who was the person especially named for that purpose by the Department, and very properly so, as he is peculiarly conversant with such matters. Upon further enquiries, however, we find that Mr. Thom declined to tax the bills, which fact the gentleman who was instructed by the Government to have the bills taxed reported to the Department at Ottawa. He was thereupon instructed to obtain the taxation of one of the other taxing officers in Toronto. This correspondence was not produced when the matter came up for discussion in the House, and the public therefore was not at that time in possession of all the facts as we now understand them. The bills were subsequently taxed by Mr. J. B. Read, solicitor for the Law Society, under the supervision of the then taxing officer of the Queen's Bench.

## MECHANICS' LIENS.

## MECHANICS' LIENS.

THE second section of 41 Vict. chap. 17, which amends the Mechanics' Lien Act has, we believe, given rise to a good deal of difference of opinion. That section, it will be remembered, provides that the "lien shall, in addition to all other rights or remedies given by the said Act, also operate as a charge to the extent of ten per centum of the price to be paid as aforesaid by such owner, up to ten days after the completion of the work, in respect of which such lien exists, or of the delivery of the materials, and no longer, unless notice in writing be given."

The questions which have arisen are both with regard to the price upon which the ten per cent. is to be reserved, and also as to the effect of the charge which the section creates.

We think the solution of these questions is not far to seek. In the first place it must be borne in mind that the section is one passed for the benefit of sub-contractors, that is to say, for that class of lien holders who do not contract directly with the owner of the land himself. And we may best understand the effect of the section in question by considering what the position of this class of lien holders was before the passing of the Statute. If we turn to section 11 of the original Act, R.S.O., c. 120, we shall see that *all payments* made in good faith by the owner to the contractor were protected, and operated to discharge the claims of sub-contractors *pro tanto*. And if we look at section 6 of that Act we shall see that the lien of a sub-contractor cannot in any case attach upon the estate and interest of the owner, so as to make the same, or the owner, liable to the payment of any greater sum than the sum payable by the owner to the contractor. The position, therefore, of a sub-contractor before the 41 Vict. was this, his right of lien could not

in any case be enforced to any greater extent than the amount which might remain due from the owner to the contractor through whom such sub-contractor might claim; and it might be defeated altogether by the *bona fide* payment by the owner to the contractor of the full amount due to the latter upon his contract.

Now, we do not find anything in 41 Vict. extending the liabilities of the owner. His liability is still governed by section 6 of the original Act, and the only change which the 41 Vict. c. 17, s. 2, effects is to require the owner to retain in his hands for ten days after all work shall have been completed, under any contract, ten per cent. of the price to be paid by him to the contractor by whom, or through whom, such work is done. We do not think that the sum to be reserved can by any possibility be intended to be calculated on the amount of the price to be paid to the sub-contractors, because the words of the section are, "the price to be paid by such owner," and the owner has nothing to do with the price to be paid to sub-contractors.

Neither do we think there is anything in the section which can be properly construed as giving the sub-contractor a right to the charge upon the ten per cent. required to be reserved, unless by performance of the work that sum becomes due and payable to the contractor. In other words, if the ten per cent. is never earned the sub-contractors, we should think, can have no charge upon it.

All the 41 Vict. was intended to accomplish was to give sub-contractors a chance of making good their claim to the ten per cent. before it should be paid over to the contractor, and this will very clearly appear by a consideration of section 11 of the original Act as amended by 41 Vict., and in connection with which the second section is obviously intended to be read. Section 11 as amended protects all *bona fide* payments up to ninety per cent. made

## MECHANICS' LIENS.

before notice in writing of a lien of a sub-contractor. Section 2 in effect says that the remaining ten per cent. cannot be paid even though no notice of lien be given by a sub-contractor, until ten days have elapsed from the completion of the work. In other words, for those ten days the lien of the sub-contractor is preserved as against the owner, and no payment made of the ten per cent. within that period can be set up as against any sub-contractor notifying the owner of his lien within that period. But that is a very different thing from saying that the ten per centum is liable to answer the claims of the sub-contractor in any event, even though it has never been earned by the contractor. Such a view of the statute would amount to a practical repeal of the equitable provision contained in section 6 of the original Act, to which we have referred.

The price on which the ten per centum is to be reserved we should have supposed must be the whole contract price. The statute is framed on the assumption that the contract is completed. The case of a contract being only partially performed is not apparently within the contemplation of the Act. Assuming that the contract is completed, there is no difficulty in determining what the statute means. It is when there has been a breach of contract by the contractor, and the ten per cent. has not been earned by him, that the difficulty arises.

To meet such a case it has been argued that the 41 Vict. c. 7, s. 2, requires that the owner should always keep back ten per cent. of the price of the work from time to time actually completed, and this view we see has been recently adopted in *re Cornish*, by the Divisional Court of the Chancery Division. The Court was not, however, unanimous in opinion, PROUDFOOT, J., holding that the ten per centum must be reserved on the whole contract price, and that the sub-contractor

was entitled to a lien thereon, whether it had been earned or not by the contractor; while the other members of the Court held that it was the duty of the owner to reserve only ten per cent. of the price of the work actually performed, and on this sum only the sub-contractors were entitled to a lien.

This construction of the statute is in favour of sub-contractors, but appears to us to impose on owners of land a very serious responsibility. For while it may be easy enough for them to reserve ten per cent. of the whole contract price, it may be very difficult indeed to determine day by day what is ten per cent. of the value of the work actually performed. The question, we believe, is likely to receive further elucidation shortly by the Court of Appeal.

Another statute has been passed at the recent session of the Ontario Legislature, making further amendments in the original Mechanics' Lien Act. In order to ascertain the law on this subject, therefore, it is now necessary to search through and compare the various provisions of four statutes. Considering the nature of this legislation, we cannot but think that this is one of all other statutory enactments which it should be the aim of the Legislature to keep in as easily accessible a form as possible; and that instead of putting a patch here, and a patch there, from session to session, the Act, as often as amendments are needed, should be re-enacted with the amendments required.

This, we think, should be the general rule as to Acts of Parliament. If it were we should possibly have less tinkering, and it would certainly give both the profession and the public a great deal less trouble in mastering the details of statute law,—a task which every year becomes more difficult, as the production of our two legislative mills is annually thrown upon the public.

## OUR ENGLISH LETTER.

## OUR ENGLISH LETTER.

*(From our own Correspondent.)*

THIS is a peculiar time to choose for writing a letter upon legal subjects, for it is precisely the last day but two of the Whitsuntide vacation. Nevertheless, there is certainly not any dearth of legal topics, either of a technical or a more popular character. Two recent decisions upon the law of betting partake of both elements. In *Read v. Anderson* an action was brought by what is known as a Turf Commission Agent to recover money paid by him on account of his principal. The matter stands at present in this position that Hawkins, J., who is himself something of a sportsman, and Bowen and Fry, L.JJ., consider that the action is maintainable on the ground that if the agent had not paid the money which he had lost on behalf of his principal, he would have incurred a genuine loss in that he could have been posted at "Tattersall's" as a defaulter, and could have been deprived of future chances of earning his living. The Master of the Rolls on the other hand held that the action must fail because the wagers, which were its original subject matter, could never have been enforced at law. One other case was tried before Hawkins and Smith, JJ., sitting as a Divisional Court, and resulted in a judgment to the effect that it would be most irrational to say that a man kept premises for the purpose of betting merely because betting took place upon those premises. Henceforward, it will be essential for the guardians of the public morality to prove in these cases that either the occupier of the premises or his servants for him are interested in the betting which there takes place.

In other respects the past sittings of the Supreme Court, although they have been by no means barren of work, have been unfruitful of interesting results. Very few

new lights have been shed upon the interpretation of the law, and the most important of new pieces of legislation, the new Bankruptcy Act, has been proved to be almost a dead letter. Under this, however, there have been a few decisions distinctly illustrative of the principle which underlies the Act. It is an Act for the glorification of officialism, and the tendency is to give such an interpretation of diverse sections as amounts to a reluctant confession that the official receivers have been placed in a position in which they are free from the control of, and above all responsibility to, the Court. In a recent case the official receiver simply declined to sanction the appointment of a trustee named by the majority of creditors, and upon an appeal it was held that the matter was one within the sole discretion of the official receiver, and that the court had no jurisdiction to interfere with him. The crop of books upon the subject is enormous; but the best of them is that of the veteran bankruptcy lawyer, Mr. Cooper Willis, Q.C. It is the only work which is thoroughly bold in suggestion, and it follows that, if the new Act is to be interpreted upon the principles enunciated by the late Sir George Jessel, this is precisely the class of book which is wanted.

MEANWHILE Parliament has been very active in the legislative way. The Franchise Bill will inevitably be passed, and will equally inevitably produce a large amount of work for lawyers. The Criminal Evidence Bill is, in its way, one of the most serious measures that has ever been introduced to the notice of Parliament. Its success is regarded as certain, and it cannot be long delayed. It has passed through the ordeal of the grand committee, its principle has long ago been approved by the House of Lords, and public attention has been directed to the matter by one or two recent cases. There was the

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 OUR ENGLISH LETTER—IN RE ARBITRATION BETWEEN THE C. S. RY. CO., AND Z. B. LEWIS.
 

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O'Donnell case which produced the memorable manifesto of the majority of the judges against statements by prisoner's counsel; a proclamation unprecedented in character and probably not binding in a legal sense, even upon the judges who had subscribed to its terms. Then there was the case of Lord St. Leonards, to which reference has been made in a former communication, an example of the peculiar class of case in which the Bill finds its strongest argument. Nevertheless the measure is one which cannot be regarded without considerable apprehension. The relaxation of the old rule which forbade the parties to a suit to give any evidence, has been followed by an enormous growth of perjury in the witness box. But in civil matters there is this safeguard against perjury that it is criminally punishable. In a criminal case, however, there is no safeguard. A man charged with a felony has every inducement to commit perjury; for, if he is not found out, he may by adding an additional burden of guilt to an easy-going conscience escape scot-free, and if he is found out he is in no worse a position than he would have been if he had said nothing and had been found guilty on the original charge. The position of prisoners as a class will not be improved. If they make no statement the presumption will be that they are guilty; if they do make a statement they will in the first place not be believed, and in the second place, if the burden of the independent evidence is against them, they will increase the severity of their punishments. There is, therefore, much to be said against a measure of which that experienced criminal lawyer, Sergeant Ballantyne, openly disapproves.

MR. CHAMBERLAIN'S Railway Bill does not commend itself to the Association of shareholders of which Lord Brabourne and Sir E. Beckett are the leading spirits. It interferes, they say, with free contract

between the railway companies and the public. But they omit to consider that free contract can only be justified where the contracting parties stand in a position of equality. Here it cannot be pretended that they do. By virtue of compulsory powers the railway companies practically monopolise the effectual means of transit from place to place; the public must travel; the public is powerful; and it does not care about being handed over, bound hand and foot to the tender mercies of Sir Edward Watkin and Sir E. Beckett. This is Mr. Chamberlain's argument, short and concise, but impossible to gainsay.

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 REPORTS.
 

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 ONTARIO.
 

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 (Reported for the CANADA LAW JOURNAL.)
 

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 COUNTY COURT.
 

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 IN RE ARBITRATION BETWEEN THE CANADA  
SOUTHERN RAILWAY COMPANY AND  
Z. B. LEWIS.

*Arbitration—Railway lands—Easement thereon—  
Ultra vires—Title by possession—R. S. O.  
cap. 108, sec. 35.*

The Directors of the E. & O. R. Co. in 1853 passed a resolution permitting Z. to lay pipes along the line of the railway from a reservoir to convey water to Elgin (Niagara Falls), some two miles.

Z. exercised the privilege by laying the pipes alongside the track and enjoyed it until his interest was sold to L., who obtained from the E. & O. R. Co. a confirmation deed, and he has continued in use of the pipes ever since.

The E. & O. R. became vested in the E. & N. R. Co. It became necessary to alter the railway line and change the grade, and the C. S. R. Co. in doing the work at some places exposed the pipes, at others increased the depth of earth over them, and also placed tracks over the pipes at other points. The C. R. S. Co. required to take from L. a piece of land for right of way to which the privilege stated was appurtenant, and under the Con. Ry. Act, 1879, served an arbitration notice on L., and, besides offering compensation for the land taken, proposed to relay and depress those portions of the pipes that had been exposed, but said nothing as to the other portions affected. L. contended that having had quiet possession of the whole line of pipes for over twenty years the company was

## IN RE ARBITRATION BETWEEN THE CANADA SOUTHERN RY. CO. AND Z. B. LEWIS.

bound to restore the whole line in as good a position as it was before, but *held*, that L. had not an absolute title to the easement, the resolution of 1853 and subsequent deed being *ultra vires* the company; and that, therefore, the easement could not be said to lie in grant so as to confer a title by possession by a user for a term shorter than forty years under sec. 35 R. S. O. cap. 108.

*Held*, further, that a railway company has no power to make grants in derogation of the purposes and objects for which it is incorporated, and which might prevent the performance of its public duties, the easement in question being of that character.

*Held*, also, that the C. S. R. Co. could not be required in this case to perform any works beyond those proposed in its notice to arbitrate.

[St. Catharines.]

The line of the Erie and Ontario Railway which subsequently became the Erie and Niagara Railway, runs along the top of the bank on the west side of the Niagara River from a point above the Falls down to the town of Clifton, now Niagara Falls.

Mr. Zimmerman under the resolution set out in the judgment and about 1853 constructed a reservoir on the east side of the Railway in Range 10 just above the falls and from thence laid a water main six inches in diameter to Clifton, a distance of about two miles along the E. and O. track.

Subsequently Mr. Lewis purchased the interest of Mr. Zimmerman in the water works and having obtained the deed mentioned in the judgment, constructed a new reservoir on the west side of the track in Range 10 and connected it with the water main and continued in the uninterrupted use and enjoyment of the whole water works system until this time.

The Canada Southern Railway operated the Erie and Niagara Railway and obtained an Act from the Dominion Parliament, 45 Vict. ch. 68, sec. 2, authorizing the construction of a branch from its main line to some point on the Niagara River, and under the authority of this Act, in the summer of 1883 located the branch from its main line at the town of Welland to the town of Niagara Falls near Suspension Bridge, adopting the right of way of the Erie and Niagara Railway in some places, from a point above the falls down to the town of Niagara Falls.

It became necessary to depress the old track very considerably in some places, and to raise it in others to make a uniform grade.

The C. S. R. required a portion of range 10 between the reservoirs for right of way; and for some distance along the track, the pipe line was exposed by the construction of the requisite works.

The cut at range 10 was about twenty-five feet deep and in excavating this, the two pipes, supply and discharge, leading between the reservoirs became exposed and suspended in the air.

On the 16th of September 1883 the C. S. R. served a notice under the Consolidated Railway Act 1879, sec. 9, sub-section 12: (1) describing the land required for railway purposes in range 10 and then proceeded as follows:—(2) "You are also notified that the said company intended to exercise certain powers (and which are hereinafter set out) in regards to certain appurtenances to the said land, comprising the pipe line now existing between the the said reservoirs, upon the said range 10, and from thence to the town of Niagara Falls, and used for the purpose of conveying water to the said town, and a right to lay pipes from the said reservoirs along the line of the E. and N. Ry. Co. to the said town, and the portion of the said pipe line, and appurtenance in reference to which such powers are to be exercised, may be more particularly described as follows":—

The different points at which the pipe line would be exposed or become within five feet of the surface was then described and a general clause was added as follows:—

"And those portions of the said pipe, at whatever point the same may become within five feet of the surface of the ground, owing to the construction of its line or the alteration of the Erie and Niagara line, by the C. S. R. Co."

(3) "The powers to be exercised by the said company in regard to the said appurtenance are to relay, depress and lower the said pipes, and to replace them where necessary, with new and similar pipes to a sufficient depth to make them five feet below the surface of the land, as the same will be at the completion of the construction of the line of the C. S. R. Company, or the alteration of the line of the E. and N. Ry. Co. and to suitably connect the said pipes with the remaining portion of the said pipe and to restore the pipe so to be relaid to their former state of usefulness."

The last clause adopted the words of sec. 7, sub-sec. 6, of the Railway Act.

Compensation for the land and damages was also offered.

The proprietor, Mr. Lewis, served a notice refusing the offer, and then proceeded as follows:— "And I further give you notice that I claim that your expropriation in fact destroys my franchise, and under any circumstances will render my property useless as a means of supplying water to my present or future customers; and I further claim that you are not under any circumstances entitled or empowered to enter into my pipe line to elevate or depress the same, or replace the pipes or other fixtures or appurtenances necessary to put the works in repair again; and I further claim that

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my entire damages, whatever they may be, must be determined by arbitration and paid me."

The arbitrators appointed were Judge Kingsmill for the company, Mr. Orchard for the proprietor, and Judge Senkler as third arbitrator.

The solicitors for the company and proprietor agreed that the arbitrators should decide as follows:—1st. What work shall be done; 2nd, what the cost of such work should be; 3rd, by whom it shall be done and within what time; 4th, provision as to costs; 5th, and in the event of the arbitrators determining that the company shall do the work, then the company is to be allowed to take possession of the pipe so far as necessary to do the work.

Evidence was taken at length before the arbitrators on behalf of both parties on the 10th, 11th, and 12th Oct., 1883, principally consisting of experts, to show what work was necessary to be done, the cost, etc., the question as to damages being left until the work was completed.

*McClive*, for the proprietor.—The proposed changes in the E. & N. line will practically render the pipe line useless even if the C. S. R.'s offer is carried out. The track itself when changed, in many places will be over the pipe line, and in other places many feet of earth will be thrown over it. It will make access to the pipes in future nearly impossible owing to passing of trains and necessity for taking up the track. It is necessary, therefore, that the whole pipe line should be moved out from the track.

The proprietor's title is absolute under the Statute of Limitations, having been enjoyed for over twenty years. The resolution and deed of the E. & O. Company were probably *ultra vires*, but this defect has been cured by the statute. The C. S. R. having interfered with this property in part must restore it altogether to its former state, and the proprietor is entitled to have a new pipe line throughout.

*Symons*, for the company.—The resolution and deed of the E. & O. Company were *ultra vires*, as tending to interfere with franchises granted for a particular purpose. If these instruments were valid they would prevent the carrying out of the objects for which the railway was incorporated, and would besides interfere with its duty of the public.

The Statute of Limitations would not operate before at least forty years, and the proprietor's right is not absolute yet, if it can ever become so.

The company would probably be entitled to treat the proprietor as a trespasser, but this position it has not taken, but offers to restore the pipe that is to be re-laid to its former usefulness. That is the utmost that can be asked.

The evidence clearly shews that the pipes when re-laid as proposed will leave the whole pipe line in a better condition than it was before.

SENKLER, Co. J.—On the 18th October, 1853, a resolution was passed by the Board of Directors of the Erie and Ontario Railroad Company, giving to the late Samuel Zimmerman the privilege of laying the water pipes along the track from the pavilion to Elgin, past the station above the Clifton House for the purpose of conveying water to Elgin.

The Erie and Ontario Railroad ran along the westerly side of the Niagara River, and now is part of the Canada Southern Railroad and belongs to that company. The pavilion lies west of the railroad. Elgin is now the town of Niagara Falls.

Mr. Zimmerman constructed a reservoir near the pavilion, and by means of a water power on the Niagara River forced water through a pipe from the river into the reservoir; the pipe crossed the railroad being sunk under the track. He then, by other pipes along the right of way and beside the track of the railroad, conveyed the water from the reservoir to Elgin.

Nothing of this was done prior to 1853. Mr. Zimmerman died in 1857, and after his death the Bank of Upper Canada purchased the right of Zimmerman to these works at sheriff's sale under execution against Zimmerman's executors, and conveyed the same to Lewis and one Bender, and on or before January 11th, 1860, the executors of Zimmerman, and the Directors of the Erie and Ontario Railroad Company, by deed confirmed the sale so far as they had power to do so, and granted and re-leased to Lewis and Bender the rights and privileges which had been enjoyed by Zimmerman. Lewis has acquired the rights of Bender and is now the sole proprietor.

The privileges have been enjoyed continuously since about 1853.

The Canada Southern Railway Company are now engaged in laying a second track and making other changes in their road, including a deep cutting at the place where the pipe, through which water is forced from the river to the reservoir, crosses the railway by reason of which changes the last mentioned pipe is completely exposed, and its present position is a number of feet higher than the new track will be in the cutting, and the pipe leading from the reservoir to Niagara Falls is in some places exposed entirely, and in other places is almost uncovered and insufficiently protected by the earth left over it. The new track will in places be directly over this line of pipe.

The company, by their notice given under the Consolidated Railway Act 1879, propose to re-lay, depress and lower the said pipes, and to re-place

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them where necessary with new pipes so as to make them five feet below the surface of the ground as the same will be at the completion of the line of the railway, and so connect the pipes so relaid with the remaining portion of the pipe and restore the pipes so re-laid to their former usefulness.

The claimant (Lewis) contends that the pipes cannot be satisfactorily laid beneath the track of the railway from the reservoir to the town, both on account of the shaking of the ground caused by passing trains and the difficulty of getting at the pipes to repair them when necessary, and contends that he has by length of possession or enjoyment obtained an absolute and indefeasible right to keep and maintain the pipes in their present position, and that the company had no right to interfere with them in any way without his consent.

The right is not claimed so much under the resolution of the Directors or the subsequent deed of confirmation (both of which it is hardly denied were *ultra vires*), as under the Prescription Act.

In considering the effect of this Act it is necessary to bear in mind the law upon the subject prior to the passing of the Act.

At Common Law in England an enjoyment to confer a title to an easement must have continued "during time whereof the memory of man runneth not to the contrary," i.e., since the reign of Richard I. The extreme difficulty of giving proof of enjoyment for so long a period was lessened by its being held that evidence of enjoyment during a shorter time raised a presumption that such enjoyment had existed for the necessary period. When, however, the actual origin of the enjoyment was shewn to have been of more recent date than the time of prescription the right in earlier cases was held to be defeated.

The Courts seemed to have considered the subsequent Statutes of Limitation passed as to writs of right and possessory actions not to apply to easement, but they allowed a new kind of title to be set up by presumption of a grant made and lost or made on terms, and on this ground it was held that a title might be obtained by an enjoyment for twenty years, which was in reality prescription shortened in analogy to the limitation of the 21 Jac. 1, and introduced into the law under a new name, for "the law allows prescription only in supply of the loss of a grant, and therefore every prescription pre-supposes a grant to have existed." See Gale on Easements, 5th edition, 161, citing 2 Black. Com. 265, *Potter v. North*, 1 Ventris 387.

This was the position when the English Prescription Act 2 and 3 Will. IV. cap. 71 was passed. 10 and 11 Vict. cap. 5, embodied in the R. S. O. cap. 108 (sec. 34 to 41 inclusive), is about identical with the English Act.

Section 35 of the Revised Statute (which is the same as section 2 of the English Act), enacts that no claim which may be lawfully made of the common law by custom, prescription, or grant, to any way or other easement, or to any water course, or the use of any water to be enjoyed or derived upon, over or from any land or water, etc., when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to the period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated, and when such way or other matter as herein last before mentioned has been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Two distinct periods of user are specified with regard to the easements mentioned in this section. As far as regards the shorter period fixed, an enjoyment for twenty years, the statute makes no difference in the mode of defeating the user existing at common law, except that it shall not be defeated by proof of origin at some time prior to the twenty years. The enactment as to the longer period of forty years materially restricts the common law modes of defeating the effect of user of an easement, declaring that user for that time shall give an absolute and indefeasible right, notwithstanding any personal disability on the part of the owner of the servient tenement, unless it shall appear that the same was enjoyed under some consent or agreement by deed or writing.

It may be remarked here that easements as to light are placed by the statute on a different footing from other easements, only one period, viz., twenty years, being mentioned, and an enjoyment for that period having the same effect as an enjoyment for forty years or any of the other easements. This is only mentioned for the purpose of shewing that authorities on the question of light do not necessarily bear upon other kinds of easements.

In the present case there is no pretence that the easement has been enjoyed for forty years. The claim must be supported, if at all, as an easement which has been used or exercised for twenty years, and consequently is liable to be defeated in any way in which such a claim could be defeated at common law except by shewing that it was first enjoyed at any time prior to twenty years ago.

## IN RE ARBITRATION BETWEEN THE CANADA SOUTHERN RY. CO. AND Z. B. LEWIS.

If such a claim had been made at the common law under a lost grant, it could have been defeated by shewing that the owner of the servient tenement was not capable of making a grant on the principle that when a good consent be expressly made none can be implied or presumed, and in the case of *Rochdale Canal Company v. Radcliffe*, 18 Q. B. 287, it was held that a plea under the Prescription Act of user for twenty years, although the user was proved, would not avail against the plaintiffs, who could not consistently with the enactments establishing and regulating their canal have granted the water for the purpose for which it was used by the defendant; that if they had attempted to do so such a grant would have been *ultra vires* and bad, and would not have bound them, and that consequently the twenty years' user would establish no right.

In the case of the proprietors of the *Staffordshire and Worcestershire Canal Nav. v. Birmingham Canal Navigation*, L. R. 1 E. & I. A. 254, it was held that there was in that case no existing stream of water the use of which could be claimed by the appellants, but if there had been such a stream the Prescription Act would not help them for the reason given by Lord Westbury at page 278, as follows:—

"But if the Prescription Act had been at all applicable it would be incumbent on the appellants to prove that the right founded on the claim by user might at the beginning of or during that user have been lawfully granted to them by the respondents' company. No such proposition can be maintained. Had any grant been made at any time by the respondents' company of the right now alleged by the appellants to have been acquired against them by user, such grant would have been *ultra vires* and void, as amounting to a contract by the respondents not to perform their duty by improving the navigation and conducting their undertaking with economy and prudence."

In the *National Guarantee Manure Co. v. Donald*, 4 H. & N. 8, the principle governing the *Rochdale Canal Company v. Radcliffe* above referred to, was recognized and adopted by Pollock, C. B., in his judgment on p. 16.

In *Mason v. Shrewsbury and Hereford Ry. Co.*, L. R. 6 Q. B. 578, the case last cited is referred to but no positive opinion is expressed on the point now under consideration, the case being decided on other grounds.

In Washburn on Easements, 3rd ed., at p. 120, it is said:—"It may be added, though already implied if not expressly stated, that in order to establish a prescriptive right, it must be claimed under and through some one who had a right to grant or create the easement claimed."

In Gale on Easements, 5th edition, page 202, note "M.," it is said:—"In respect of statutory disabilities to grant, a distinction appears to exist between those cases where there is simply no power to grant and those where there is an absolute prohibition; in the latter case it would seem that an enjoyment even for the longer period would confer no right, although in the former it might. In neither case can any right be gained under the statute by enjoyment for the shorter period."

As to the power of the Erie and Ontario Railroad Company, or any of the railroad companies which subsequently acquired the rights of that company and continued its railway to make a grant of a right to carry a water course through its land, or of anything else which would have the effect of lessening its control over its own land for railway purposes, it was not contended that such power existed, and I do not think it could be so contended.

This railway company had no doubt power to take the land belonging to individuals for the purposes of its railway, and it ought not to be allowed to apply those lands to other purposes foreign to the railway.

I am therefore of opinion that the claimant has not by the use of the company's land since 1853, for the purposes of conveying water through pipes to the (present) town of Niagara Falls, acquired any absolute and indefeasible right or easement to have the pipes maintained in their present position so as to prevent, limit, or in any way interfere with the use by the railway company of its land for the purposes of its railway.

If the Canada Southern Railway Company carry out the offer made by them in their notice to Mr. Lewis under the Consolidated Railway Act 1879 already referred to, in a proper manner, in my opinion Mr. Lewis will certainly get all he has a legal right to. It will remain for the arbitrators to consider (under the agreement signed by the counsel) whether the mode of carrying this out suggested by the company's engineer, will satisfactorily restore the pipes to their former state of usefulness.

Concurred in by the other arbitrators.

[The arbitrators subsequently made an award directing the company to do the work within thirty days in the manner and at the places proposed in their notice, the diameter of the pipes to be similar to old pipes except at the reservoirs, the pipes there being increased from 6 inches to 8 inches, also permitting the company to use the old pipes where that could be properly done.]

## RECENT ENGLISH PRACTICE CASES.

## RECENT ENGLISH PRACTICE CASES.

## SEARLE V. CHOAT.

*Imp. Jud. Act 1873, s. 24, sub-s. 5, 7—Ont. Jud. Act s. 16, sub-s. 6, 8.*

*Receiver—Action to restrain receiver appointed in another action.*

[C. A., L. R. 25 Ch. D. 723.]

A person who is prejudiced by the conduct of a receiver appointed in an action by way of equitable execution, ought not without leave of the court to commence a fresh action to restrain the proceedings of the receiver, even though the act complained of was beyond the scope of the receiver's authority; but ought to make an application for such relief as he is entitled to in the action in which the receiver was appointed.

COTTON, L.J.—The whole tenor of the Judicature Acts is to require all proceedings as far as possible to be taken in one action.

## KEITH V. BUTCHER.

*Imp. O. (1883) 16, r. 11—Ont. r. 103.*

*Action for foreclosure—Discovery of puisne mortgagees—Amendment of judgment before entry.*

[L. R. 25 Ch. D. 750.]

When judgment in a foreclosure action had been pronounced, but had not been drawn up and entered, and it was discovered that there were puisne mortgagees, leave was given under the above rule, to amend the writ and statement of claim by making the puisne mortgagees defendants.

## CARDINALLI V. CARDINALLI.

*Imp. O. (1883) 36, r. 3—Ont. Jud. Act s. 45.*

*Mode of trial—Trial by jury—Action assigned to Chancery Division—Trial before official referee.*

[L. R. 25 Ch. D. 772.]

If in an action it appears that there is a simple question of fact, the verdict upon which would decide the issue in the action, it should be sent for trial by a jury; but if the action is one of those which by the Imperial Judicature Act, 1873, is assigned to the Chancery Division, and the question raised is a mixed one of law and fact, where the verdict of a jury would not decide the case, but the judge would have afterwards himself to decide the whole matter at issue between the parties, such a case should not be sent to be tried by a jury.

The mere fact that an action will be tried more quickly, is not a sufficient reason for sending it to be tried at the Assizes.

It was not intended by the Judicature Act that an official referee should decide the issue in an action; he is only to ascertain the facts so as to enable the Court to decide the issue.

PEARSON, J.—It is admitted that the question in the present case, partnership or no partnership, is a mixed question of law and fact, and in any direction which the judge could give to the jury, he could only put and obtain answers to certain questions; and, when he had got their verdict in this way, he must himself apply the law to the determination of the issue between the parties. The action has been properly set down in this Division, and it must be ultimately decided by a judge. It is probable that when it comes on for trial the judge will find that he does not require the assistance of a jury, and that the only difficulty will be in applying the law to the facts. I think I ought not to withdraw the action from the Division in which it has properly been set down. I do not consider it a fit case to send to an official referee. In my opinion it was not intended that official referees should decide the issue of an action; it was only intended that they should ascertain the facts so as to enable the Court to decide the issue.

## UNITED TELEPHONE COMPANY V. DALE.

*Injunction—Breach before service of order—Committal.*

[L. R. 25 Ch. D. 778.]

In order to justify the committal of a defendant for breach of an injunction, it is not necessary that the order granting the injunction should have been served upon him, if it is proved that he had notice of the order *aliunde*, and knew that the plaintiff intended to enforce it; and the rule is wrongly stated in the text-books, where it is said in no case after an injunction has been granted, and there has been sufficient time to pass and enter the order and to serve it, will the Court commit the defendant to prison for a breach of the injunction, unless the order has been served upon him.

PEARSON, J.—In any case in which the plaintiff has been guilty of such *laches* that he may possibly have misled the defendant, this Court will not interfere if he has not served the order, shewing by its service that he intends to act upon it. I use the word "possibly" in its largest and widest sense, to shew that this Court will never run the risk of doing that which may be harsh or unjust to the defendant in a case of this kind, by committing

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him to prison for a breach of an injunction, if there be the slightest doubt whether, owing to the conduct of the plaintiff, he may not have been drawn into the idea that it never was the plaintiff's intention to enforce the injunction.

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## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
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### SUPREME COURT.

From Ontario.]

St. JOHN v. RYKERT.

*Account—Payment under pressure—Statute of Limitations—Interest on judgment debt—Interest on covenant on a mortgage deed as collateral security.*

By a decree of the Court of Chancery it was directed that an account should be taken of all dealings between St. J. and R., and the master found that \$453.20 was due to R. by St. J., the plaintiff. The master disallowed to the plaintiff, the amount of a note of \$510 and interest thereon, and reduced the interest on a sum of \$3,000 advanced from 24 per cent. to 6 per cent. after judgment had been recovered. The note of \$510 was dated 18th November, 1861, and was payable with interest at the rate of \$10 per week from the 23rd November, 1861. On the 6th March, 1867, R., who had been sued by St. J. for certain other claims, entered into an agreement with him in order to relieve himself from the pressure of execution debts, paid him \$2,000 on account of his indebtedness and got time for the balance. St. J. made no demand at the time for this note, and did not instruct his attorney who acted for him, to seek payment of it until 1870.

*Held* (affirming the master's report), that this payment of \$2,000 was a payment on account of the debts for which R. was being pressed, and as this note of \$510 was not included in said debts the master was right in

treating the note of \$510 as barred by the Statute of Limitations.

A note dated 11th January, 1862, and payable to and endorsed by one S. H. for \$3,000, "with interest at the rate of 2 per cent. per month until paid." By a covenant for payment contained in a mortgage deed of the same date given by R. to St. J. as collateral security for the payment of the said note, R. covenanted to pay "the said sum of \$3,000 on the 11th day July, 1862, with interest thereon at the rate of 24 per cent. per annum until paid." A judgment was recovered upon the note but not upon the covenant. The master allowed for interest, in respect of this debt, 6 per cent. only from the date of the recovery of the judgment.

*Held*, that the proper construction of the terms of both the note and covenant as to payment of interest, is that interest at the rate of 24 per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate, after such day, if the principal should then remain unpaid.

*Appeal dismissed with costs.*

McCarthy, for appellant.

Bethune, for respondent.

From Ontario.]

PAGE v. AUSTIN.

*Liability of shareholder—Estoppel.*

The Ontario Wood Pavement Company, incorporated under 27-28 Vict. ch. 23, with power to increase by by-law the capital stock of the company "after the whole capital stock of the company shall have been allotted and paid in, but not sooner," assumed to pass a by-law increasing the capital stock from \$130,000 to \$250,000. P., and others, execution creditors of the company whose writ had been returned unsatisfied, instituted proceedings by way of *scire facias* against A. as holder of shares not fully paid up in said company. It appeared from an examination of the books that the company assumed to increase the capital, notwithstanding that the original capital had not been fully paid in, and that the shares alleged to be held by A. were shares of the increased capital and not of that originally authorized.

*Held* (affirming the judgment of the Court

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below, GWYNNE, J. dissenting), that, as the directors had no power at that time to increase the capital of the company, the stock for which A. or his assignor subscribed had no legal existence, and therefore P. *et al.* were not entitled to recover.

When a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock he supposed to be in existence from questioning the legality of the issue of such stock.

*Appeal dismissed with costs.*

Bethune, Q.C., for appellant.

Robinson, Q.C., for respondent.

From Manitoba.]

MAY V. MACARTHUR ET AL.

*Contract of sale—Rescission of—False representations—Fraud—Joint liability of parties who received consideration.*

M. filed a bill to set aside the sale of a parcel of land in the parish of St. John, described in the deed to M. as being block No. 35, containing fifty-two lots according to plan registered alleging conspiracy and false and fraudulent misrepresentations. The sale to M. was effected under the following circumstances:—McL. and McA. were interested in a contract with the Bishop of Rupert's Land for the purchase of three blocks of land containing fifty-two lots each, and McL. with McA.'s consent and sanction came to Toronto to sell the land. In Toronto one G. met McL. and agreed with him to find purchasers, G. to get any money over \$100 per lot. G. thereupon solicited M. to purchase the land, stating that he had secured the lots for a very short time at \$150 per lot, but that right was contingent upon his taking all the lots contained in the three blocks offered for sale, and represented that one block of the land in question was facing McPhillips Street. M. said he would purchase, provided G. and one D. and himself were co-partners or joint investors in the three blocks. An agreement was signed to that effect, but it was ultimately agreed that M. should pay for and take the conveyance to himself of block 33 at \$150 per lot. G. filled up a conveyance which had been signed in blank by McL. of

lot 35 from McA. to M., and induced him to accept it without further inquiry by producing and delivering a guarantee from McL. that he had a power of attorney from McA., and that the plan was registered and title was perfect. M. paid \$5,200 cash and gave a mortgage for \$2,500. G. got \$2,500 of this purchase money. M. subsequently ascertained that the block of land in question did not front on McPhillips Street, and that G. and D. were not joint investors with him, and that statements in the guarantee were false. By his bill M. prayed that the sale be set aside, the portion of the purchase money already paid be repaid to him, and that the mortgage given to secure payment of the remainder cancelled.

*Held*, that the false and fraudulent representations made by G. and McL. entitled M. to the relief prayed for against McA. and McL. and G. jointly and severally.

*Appeal allowed with costs.*

Robinson, Q.C., for appellant.

Lash, Q.C., and Moss, Q.C., for respondents.

From Manitoba.]

HOOD V. MCINTYRE.

*Property—Offer to sell—Acceptance on completion of title—Specific performance.*

On the 26th of January, 1882, McL. wrote to H. as follows: "I, Alex. McIntyre, agree to take \$35,000 for property known as McMicken Block. Terms one-third cash, balance in one year at 8 per cent. per annum; open until Saturday 28th noon." On the same day he accepted this offer in the following terms: "I beg to accept your offer made this morning. I will accept the property known as McMicken Block, being the property on Main Street, for \$35,000, payable one-third cash on completion of title, and balance in one year at 8 per cent. You will please have papers and abstract submitted by your solicitor to N. F. Hagel, Esq., 22 Donaldson's Block, as soon as possible, that I may get conveyance and give mortgage."

The property was then under lease of which H. had notice. On a bill for specific performance, the Court of Q.B. (Man.), decreed that H. was entitled to have said agreement specifically performed. On appeal to the Supreme Court of Canada.

Q. B. Div.]

NOTES OF CANADIAN CASES.

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*Held* (RITCHIE, C. J. and FOURNIER, J. dissenting), that there was no binding acceptance of the offer of sale, and therefore no completed contract of sale between the parties.

*Appeal allowed with costs.*

*Lash*, Q.C., for appellant.

*McCarthy*, Q.C., for respondent.

### QUEEN'S BENCH DIVISION.

Osler, J.]

WALKER V. MURRAY.

*Charity—Devise to—Mortmain Acts.*

Incorporation will not be attributed to Sisters of Charity to invalidate a devise as within the Mortmain Acts.

Rose, J.]

REGINA V. CARTER.

A Justice of the Peace cannot try misdemeanours in a summary way, unless so authorized by statute.

*H. J. Scott*, Q.C., for motion.

*N. Murphy*, contra.

Rose, J.]

LAPLANTE V. PETERBOROUGH.

*By-law—Closing of street.*

A by-law for closing up part of a street which was applicant's only means of access to land deeded to him by defendants, and which did not provide other mode of access, was held invalid on this ground: also because a month's notice had not been given of the intended by-law; because the mode of arbitration provided was by the mayor and one person, each named by the railway company—which was not the statutory mode; and because, instead of the award being directed to be made within a month from the appointment of the third arbitrator, it was to be made within a month from the passage of the by-law.

*Aylesworth*, for motion.

*Watson*, contra.

### COMMON PLEAS DIVISION.

Full Court.]

REGINA V. CORPORATION OF THE COUNTY OF PERTH.

*Ways—Road between two townships—Purchase by county—Omission of seal and signatures from by-law—Power to divest—Liability to repair.*

The road in question herein ran between two townships in the defendant's county, and was originally constructed by an incorporated joint stock company. In 1866 the defendants purchased the road at a sheriff's sale under an execution against the company and received a deed from the sheriff. A by-law was passed authorizing the purchase, but through inadvertence it was not signed or sealed, but the purchase was recognized in subsequent by-laws; and the defendants took possession and exercised exclusive jurisdiction over the road, and dealt with it as their own property until the 8th June, 1881, when they passed a by-law divesting themselves of the road.

*Held*, that the county had no original jurisdiction over the road under the Municipal Act; and though they might acquire the road by purchase from the company under by-law legally passed for such purpose, and assuming that the defendants by their conduct were estopped from denying the validity of the by-law passed authorizing the purchase, or that the seal and signature could now be directed to be affixed, both of which assumptions were open to doubt, still the defendants had, as they had the right to do, divested themselves of the road, and were therefore not liable thereafter to keep the road in repair.

*Idington*, Q.C., for the Crown.

*R. Smith*, Q.C., contra.

Rose, J.]

RE CROMIE AND CORPORATION OF BRANTFORD.

*Tavern and shops—By-law fixing number of licenses—Whether should state number of inhabitants—Statement that by-law to remain in force until repealed—Duty in excess of \$200—Ultra vires.*

It is not necessary that a by-law passed by a city respecting tavern and shop licenses

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.]

should state the number of inhabitants of the city, so as to show on its face that the number of licenses fixed is within the statutory limit.

*Held*, also, that a provision in the by-law for limiting the number of licenses "for the ensuing license year beginning on the first day of May, 1884, or for any further license until this by-law is altered or repealed" was valid.

*Held*, also, that a provision in the by-law that it should remain in force until altered or repealed was unobjectionable, being merely harmless, as it was merely a statement of what the statute provided.

An objection that the by-law was invalid because in addition to the other matters therein it provided for a duty in excess of \$200 which required the assent of the electors, and therefore should have been by separate by-law, was over-ruled, because the by-law as a fact contained no such provision; but *quære*, whether the fact of a by-law containing provisions, some of which require the assent of the electors, would necessarily invalidate the by-law.

*Held*, also, that when a by-law states no particular power as its basis it must be judicially regarded as emanating from that power which could authorize its passage, and, therefore, the by-law here being silent on this point it must be deemed to have been passed by proper authority.

It was also objected that sec. 34 of the License Act of 1884 in effect repealed the by-law as it made the duty more than \$200, and the council had not submitted the question to the electors; but, *held*, that if repealed, it could not be quashed; but, *semble*, that the effect of the section was to add the increased duty to the amount already provided for by the by-laws previously passed, unless the council saw fit, prior to 18th April, 1884, to amend the by-law as to the license duty payable thereunder.

*V. Mackenzie*, Q.C., for the applicant.

*Hardy*, Q.C., contra.

Rose, J.]

#### NORTH V. FISHER.

*Foreign judgment—Action on—Limitation of action.*

To an action on a foreign judgment recovered in the Supreme Court of Albany, N.Y., the defendant set up on a defence that

the cause of action occurred more than six years before the commencement thereof.

*Held*, on demurrer, that under our law the foreign judgment is only deemed to constitute a simple contract debt, and the period of limitation being governed by the law of the country when the action is brought, and not by the *lex loci contractus*, the period of limitation as set up constituted a good defence.

*Carscallen* (of Hamilton), for the plaintiff.

*Fitzgerald* (of Hamilton), for the defendant.

Rose, J.]

#### HEWISON V. TOWNSHIP OF PEMBROKE.

*Municipal corporations—Closing up road—Road running through several municipalities—Power to close—Rule nisi.*

An application to quash a by-law must be by rule *nisi*, and not by notice of motion.

A road, originally a trespass road, running from Ottawa to Prescott through more than one county, following the course of the Ottawa River, had been used for upwards of forty years and had become a public highway. The road in its course intersected diagonally lots 1 and 2, owned respectively by the applicant and D., running from the town line on the south of lot 1 to the concession line on the west of both lots. In October, 1883, D., who was then and had been for three previous years, a member of the township council, petitioned the council to pass a by-law closing up this portion of the road, and procured E. and M., two of the council, to pledge themselves to support the by-law, in the belief that it was for the public benefit; but on thus discovering the contrary, and asking D. to release them, he refused to do so. He, however, pretended that he was not anxious for the by-law to pass, and petitioned the council that his lands might be injuriously affected thereby, asking to be heard by counsel; but, as he wished, as he said, "to be let down easy," he arranged that E. should support the by-law, which he said would be defeated. E. accordingly voted for it, as also did M. and another councillor, D. being absent, and the Reeve not voting, and in consequence the by-law carried. It appeared that D.'s counsel, who was also the township counsel, appeared at the council meeting and spoke in favour of the by-law, and that D. guaranteed

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.

the council against all expenses in the matter. It appeared also that the applicant had some buildings on his lot adjoining the road which were used by farmers, and which would be cut off by the closing of the road.

*Held*, by ROSE, J., that under the circumstances the by-law must be quashed with costs.

*Quare*, whether there is any power to close a road of this kind running through more than one municipality.

*MacLennan*, Q.C., and *Metcalf*, for the applicant.

*Aylesworth* and *Deacon*, contra.

Rose, J.]

#### REGINA V. MACKENZIE,

*Indian Act—Conviction for selling liquor—Imprisonment in default of payment of fine—Sale under medical sanction—Amendment.*

A conviction under the Indian Act for giving intoxicating liquor to an Indian imposed a fine and costs, and, in default of immediate payment, imprisonment.

*Held*, that the conviction must be quashed, for that while sec. 9 imposes as punishment for the offence fine or imprisonment, or imprisonment or fine, it does not authorize a fine, and in default of payment, imprisonment.

*Held*, also, that the conviction was invalid, because it did not negative that the liquor was not made use of under the sanction of a medical man, or under the direction of a minister of religion.

*Held*, also, that a conviction cannot be amended after the return of a writ of certiorari.

*V. Mackenzie*, Q.C., for the applicant.

*Holman*, contra.

Rose, J.]

#### BRODER V. THE NORTHERN RAILWAY CO.

*Railways—Carriage beyond defendants' line—Loss by fire—Carriers—Warehousemen—Negligence—Proximate cause of damage.*

Four car-loads of flour were delivered to the defendants at Newmarket, Ont., to be carried to Chatham, N.B., under a special contract which provided that defendants were not to be liable for any delay occasioned by want of opportunity to forward goods addressed to

consignees beyond the places where the defendants had stations; that the goods were to be forwarded to their destination by public carriers or otherwise as opportunity might offer; that the goods, pending communication with the consignees, remained on the defendants' premises at the owner's risk; that the delivery of the goods by the defendants would be considered complete, and their responsibility to have ceased when they had notified the carriers to whom they were entitled to deliver them that they were prepared to deliver over the goods for further conveyance; and that they were not to be responsible for any loss, damage, etc., after such notice. It also provided that the defendants were not to be liable for damage occasioned by fire. It appeared that the defendants' line did not extend beyond Toronto, and that the goods were to be forwarded to their destination by the G. T. R.; that on their arrival the goods were placed in the defendants' freight sheds, and notices addressed to the consignee sent to the consignor at Newmarket, and also to the G. T. R.; that defendants were prepared to deliver over the goods for further conveyance; and that after such notice, while the goods were in defendants' freight sheds, they were destroyed by fire without any negligence on the defendants' part.

*Held*, that the defendants were not liable as carriers because they had expressly limited their liability as such; nor as warehousemen for no negligence was shewn, the only negligence suggested being that they did not furnish cars for transhipment before the fire, but that such objection was not tenable; and, even if this could constitute negligence, *quare*, whether the recovery could be for more than nominal damage, *i.e.*, whether the loss by fire was the damage naturally arising from such negligence.

*Falconbridge*, for the plaintiff.

*G. D. Boulton*, Q.C., for the defendants.

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Chan. Div

Rose, J.]

**BEGG V. THE CORPORATION OF THE  
TOWNSHIP OF SOUTHWOLD.**

*Drain—By-law to clean, repair—Work done including deepening—Municipal Act 1873, secs. 570, 589—Alteration of amendment—Evidence.*

A by-law passed for raising the unpaid portion of the expense of cleaning out and repairing a drain otherwise good on its face, was objected to, on the ground that, while the resolution and by-law authorizing the work to be done was for such cleaning and repairing only, the work actually done included deepening.

*Held*, that the objection being without merits, and the by-law good on its face, and as the work had been done and paid for, the municipalities only authorizing the cleaning and repairing, and, if deepened, which was not free from doubt, the evidence shewed it was done accidentally and not by design, and as much inconvenience would ensue if the by-law were quashed, the application was refused; but apart from this, *quære*, whether under secs. 570, 589 of the Municipal Act of 1883, and 45 Vict. ch. 26, sec. 17, O., the municipality had not power without petition to do such work, including deepening, as might be incidental to maintaining the drain in an efficient state.

A further objection that the assessment was altered without notice being given affording an opportunity to appeal was disallowed, the evidence failing to establish any such alteration.

*F. Lefroy*, for the applicant.

*Cattanach*, contra.

**CHANCERY DIVISION.**

Boyd, C.]

[April 30.]

**MILL V. MILL.**

*Infant—Costs against next friend.*

Where one commenced an action as next friend to an infant without any notice to the defendant, and without any investigation as to the good reasons which the defendant had for acting in the manner complained of,

*Held*, that the next friend should pay the costs.

*Golds v. Kerr*, W. N. 1884, p. 46 approved of *Gibbons*, for the plaintiff.  
*Magee*, for the defendant.

Boyd, C.]

[June 19.]

**NELSON V. WIGLE,**

*Registered owner of vessel—Goods supplied to vessel.*

Where one brought action against the registered owner of a certain vessel for the value of goods and supplies furnished by him not on the order of the defendant, but on the order of one G. C., between whom and the defendant no relation of agency was proved,

*Held*, that the plaintiff could not recover against the defendant.

The fact that the vessel got the benefit of the supplies and necessities did not make the registered owner liable.

Boyd, C.]

[June 25.]

**ELLIOT V. STANLEY.**

*Partners—Contract—Joint and several—Breach of contract not to trade.*

The two defendants, trading in partnership as hardware merchants at C., sold out their business to the plaintiff under a written agreement, wherein they stated as follows:—

"The parties of the first part (the defendants) do hereby bind themselves to the plaintiffs under a penalty of \$2,000 that they will not do business in C. in hardware for the term of five years from this date."

Afterwards, and within the five years, one of them commenced business in connection with a third party as a hardware merchant at C.

*Held*, that this did not amount to a breach of the above agreement, though the matter was not free from doubt.

The undertaking as expressed was that they should not engage in a like business; it contemplated and provided against joint action. It was not merely that a rival trade should not be begun, but that they two would not be the parties to set up or enter upon such a business.

## Prac.] NOTES OF CANADIAN CASES—ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

*Semble*, the rule stated in *Rawle on Covenants*, 4th ed., p. 536, that when two persons jointly covenant with another, a joint action lies for the covenantee on a breach of covenant by one of the covenantees only, because they are sureties for each other for the due performance of the covenant, should be limited to the case of antecedent breaches, and not be extended to promissory engagements in the absence of language imputing such suretyship in regard to future acts or breaches.

*W. Cassels, Q.C.*, and *F. Lefroy*, for the plaintiff.

*Shaw, Q.C.*, and *W. Barrett*, for the defendants.

Boyd, C.]

[June 25.]

## BUCKLE V. BEIGLE.

*Forfeiture—Breach of covenant for payment of taxes—Landlord and tenant—Judicature Act.*

In actions to re-enter for breach of a covenant in a lease the Court will, since the Judicature Act, dispose of questions on their equitable rather than their legal aspect in all cases where, under the former practice, the Court of Chancery would have relieved against the forfeiture. Such would be the case in reference to a breach of covenant for the payment of taxes; that is emphatically one of the instances in which equity would relieve, the breach being no more than the omission of a mere money payment.

*Atkinson*, and *Christie*, for the plaintiff.

*Douglas*, for the defendant.

## PRACTICE.

Boyd, C.]

[March.]

## McDOUGALL V. LINDSAY PAPER MILL CO.

*Local Master—Jurisdiction.*

The plaintiff, as mortgagee of the defendants, by an instrument dated January 30th, 1883, purporting to be duly executed by the plaintiff, commenced an action for the sale of the mortgaged property. The writ issued, duly indorsed under Rule 17, O. J. A., and default being made, judgment was obtained under Rule 78, O. J. A., referring it to the Master

at Lindsay to make and take the inquiries and accounts as prescribed by G. O. Chy. 441 (from 168 O. J. A.).

The Master gave certain execution creditors who had been made parties in his office, and proved their claims, priority over the plaintiff on the ground that the instrument in question was invalid, the terms of sec. 85 of the Canada Joint Stock Company's Act of 1877 not having been complied with.

*Held*, that under the decree the Master had no power to adjudicate upon the validity of the instrument in question as a mortgage, and the execution creditors not having moved against the order making them parties, were also bound by the decree.

*Moss, Q.C.*, and *Hudspeth, Q.C.*, for appeal.

*Osler, Q.C.*, and *McIntyre*, contra.

Mr. Winchester.]

[April.]

## HATELY V. MERCHANTS.

*Security for costs—Jurisdiction.*

Where a plaintiff leaves the jurisdiction while his action is pending he will be ordered to give security for costs past as well as future.

*Plumb and Millar*, for defendant.

*Aylesworth*, for plaintiff.

## ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Contracts for the benefit of third persons.—*American Law Register*, January.

Libel—Privilege—Words spoken by Counsel.—*Ib.*

Party walls.—*Ib.*, February.

Innkeeper—Theft from one guest by another.—*Ib.*

Demurrage.—*Ib.*, March.

Error in quantity of land.—*Ib.*

Rights of checkholder as against bank.—*Ib.*

Drunkenness as an excuse for crime.—*Ib.*, April.

Fraction of day—When certain events take place.

*Ib.*

Criminal contempts.—*Crim. Law Mag.*, March.

Abuse of the writ of *habeas corpus*.—*American Law*

*Review*, January-February.

Preferred stock.—*Ib.*

Peculiarities of Manx law.—*Ib.*

Review of causes in courts of last resort.—*Ib.*

The Suez Canal in international law.—*Law Magazine*, February.

The laws relating to blasphemy.—*Ib.*

Common words and phrases.—*Albany Law J.*

Adjacent—Family—Seaman—Good hunter (horse)—Voluntarily—Health—Jan. 15th.

Tools of his occupation—Income contractor—Fence—Construction and erection—Last sickness—Jan. 19th.

## LATEST ADDITIONS TO OSGOOD HALL LIBRARY.

Privilege (use)—Personal indignity—Printed, tracing—Furniture—Coil—Account—Adjoining—Day—Peace—Feb. 2nd.  
 For—Adjoining—Standing or riding upon the platform—Out west—Bank note—Effects—Night, afternoon—Domestic animal—Child—March 15th.  
 Consent—Probability—Understanding—Culvert—Surprise—School—Manufactory, factory—Bridge—Traveller—Domestic animal—March 22nd.  
 Codification.—*Ib.*, March 8th.  
 Constructive notice, its nature and limitations.—*Irish Law Times*, Feb. 23rd.  
 Reasonable conditions in carriers' contracts.—*Ib.*, March 8th.  
 Dog shooting.—*Ib.*, March 22nd.  
 Liability of a parent for the torts of his minor child.—*Central Law Journal*, Jan. 4th.  
 Mistakes of law.—*Ib.*  
 Extension of time to collect taxes—Effect on sureties.—*Albany Law Journal*, Feb. 16th.  
 Assumption of mortgages.—*Ib.*, Jan. 11th.  
 Twice in jeopardy.—*Ib.*, Jan. 18th.  
 Intoxication as a defence in civil cases.—*Ib.*, Jan. 25th.  
 Costs in will contests.—*Ib.*, Feb. 1st.  
 Legacies given in a particular character.—*Ib.*  
 Authority of wife to dispose of her husband's property.—*Ib.*, Feb. 8th.  
 Party walls.—*Ib.*, Feb. 15th.  
 Liquidated damages and penalties.—*Ib.*

## LATEST ADDITIONS TO THE OSGOOD HALL LIBRARY,

CORPORATIONS.—American Corporation Cases embracing the decisions of the Supreme Court of the United States, and the Courts of last resort, in the several States and territories, of questions peculiar to the law of corporations. Vol. 6. Private Corporations.—Edited by Henry Binmore. Chicago, 1884.

MINING REPORT.—A series containing the cases of the law of mines found in the American and English reports, arranged alphabetically by subjects, with notes and references by R. S. Morrison. Vol. 3. Chicago, 1884.

MARRIAGE AND DIVORCE.—The law of Marriage and Divorce as established in England and the United States. By David Stewart. San Francisco, 1884.

DIGEST.—A Digest of the reported decisions of all the Courts, including a selection from the Irish (being a continuation of Fisher's Digest), with collections of cases followed, distinguished, explained and commented on, overruled and questioned, and references to statutes, orders and rules of Courts during the year 1883. By John Mews. London, 1884.

COPYRIGHT.—A synopsis of copyright decisions. By W. M. Greswold. Bangor, 1883.

MARRIAGE.—The Laws of Marriage, containing The Hebrew Law, The Roman Law, The Law of the New Testament, and the Canon Law of the Universal Church, concerning the Impediments of Marriage and the Dissolution of the Marriage Bonds, digested and arranged, with notes and scholium. By John Fulton. New York, 1883.

WATERS.—A Treatise on the Law of Waters, including Riparian Rights, and Public and Private

Rights, in waters tidal and inland. By John M. Gould. Chicago, 1883.

PATENTS.—The Patentability of Inventions. By H. C. Merwin. Boston, 1883. A Summary of the Law of Patents for useful Inventions with forms By W. E. Simonds. New York, 1883.

DIGEST.—Digest of Moak's English Reports. Vol. 16-30 inclusive, with a list of cases reported, and table of cases affirmed and considered, overruled or revised. By James Simmons. Also a Digest of American Notes. By N. C. Moak Albany, 1883.

COSTS.—A Treatise on the Law of Costs in the Chancery Division of the High Court of Justice, being the second edition of Morgan and Davey's Costs in Chancery, with an appendix containing Forms and Precedents of Bills of Costs. By the Rt. Hon. George Osborne Morgan and E. A. Wurtzburg. London, 1882.

CARRIERS.—Carriers' Law relating to goods and passengers Traffic on railways canals and steamships, with cases. By E. B. Watts. London, 1883.

CONTRACTS.—The Law of Contracts. By Theophilus Parsons. 3 vols. 7th Ed., with additions. By William V. Kellen. Boston, 1883.

EVIDENCE.—A Treatise on the Laws of Evidence. By Simon Greenleaf. 3 vols. 4th edition, revised with large additions. By Simon Greenleaf Crosswell. Boston, 1883.

PATENTS.—Abstracts of Reported Cases relating to Letters Patent for Inventions. By T. M. Goodeve. London, 1876. Appendix to above. London, 1877.

CARRIERS.—Wood's Browne on the Law of Carriers of Goods and Passengers by land and water. By J. H. Balfour Browne, with notes and references to American Cases. By H. G. Wood. New York, 1883.

PATENT CASE INDEX.—Containing list of all the Cases involving Patents for Inventions as reported in the States and Federal Reports, Robbs and Fisher Patent Cases, and the Patent Office Gazette up to the present time, together with a brief synopsis of the Law Points decided, arranged alphabetically. By W. P. Preble, jr. Boston, 1883.

PLEDGES.—A Treatise on the Law of Pledges including Collateral Securities. By Leonard A. Jones, Boston, 1883.

JUDICATURE ACT.—Wilson's Supreme Court of Judicature Act, Rules of the Supreme Court, 1883, and Forms, with other Acts, Orders, Rules and Regulations relating to the Supreme Courts, with practical notes. 4th edition. By M. D. Chalmers and M. Muir Mackenzie. London, 1883.

A SUBSCRIBER sends us the heading of a letter from a gentlemen with whom he will have to deal as "my learned friend on the other side," in the matter of a loan, not of any of the chattels referred to, but in his capacity as a "conveyancer."—

"HARFORD ASHLEY, Manufacturer and Sole Assignee of the celebrated Harris & Maud Patent Buggy Gears, Buggy Bodies, also Manufacturer and Sole Assignee of Fraser's Patent Improved Cheese Hoops and Gang Press. Conveyancer, etc."

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

## HILARY TERM, 47 Vict., 1884.

During this term the following gentlemen were called to the bar, namely:—

Messrs. James Bicknell, gold medalist and with honours; George Walker Marsh; Donald Cliff Ross, John Young Cruikshank, Edward James Hearn, Wilmott Churchill Livingston, Robert Walter Witherspoon, George Frederick Cairns, Francis Stewart Wallbridge, Moses McFadden, Frederick Augustus Munson, Daniel Urquhart, Edward Guss Porter, James Burdett, Alexander Monro Grier, Edmund Campion, John James Mac-laren. The last three being under Rules in special Cases.

And the following gentlemen were admitted into the Society as Students-at-Law, namely:—

Matriculants—John Frederick Gregory, William Edward Kelly, William Wesley Dingman, John Hind Hegler.

Junior Class—Michael H. Ludwig, Franklin Smoke, John B. McColl, Robert Wilson Gladstone Dalton, James Joseph McPhillips, Frederick Rohleder, Patrick Kernan Halpin, John Wesley Coe.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- 1884 and 1885. { Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.  
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## or NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

## FIRST INTERMEDIATE.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov.

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

## FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

## FOR CALL.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## FEES.

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.

# Canada Law Journal.

VOL. XX.

SEPTEMBER 1, 1884.

No. 15.

## DIARY FOR SEPTEMBER.

1. Mon.....Long vacation ends.
2. Tues.....Ct. of App. Sittings.
4. Thur.....Divisional Court Sittings, Chan. Division, H. C. J., begin.
7. Sun.....13th Sunday after Trinity.
9. Tues.....County Court sittings (York), begin.
10. Wed.....Sebastopol taken, 1855.
11. Thur.....Peter Russell, President, 1796.
12. Fri.....Frontenac, Governor of Canada, 1672.
13. Sat.....Quebec taken by British, under Wolfe, 1759.
14. Sun.....14th Sunday after Trinity.

TORONTO, SEPTEMBER 1, 1884.

THE Judicial Committee of the Privy Council, referring to the Award made by Chief Justice Harrison, Sir Edward Thornton and Sir Francis Hincks in 1878, say; "Their lordships find so much of the boundary lines laid down by the Award as relate to the Territory now in dispute between the Province of Ontario and the Province of Manitoba, to be substantially correct, and in accordance with the conclusions which their lordships have drawn from the evidence laid before them."

LIFE is made up of little things, and as a little thing would tend to promote, as we think, the comfort of gentlemen of the profession, we would suggest that Osgoode Hall Library should possess a clock which strikes the hours and half hours. As it is, one may be absorbed in preparing for a case, while waiting for a certain time to arrive at which one must be in court, and take no heed of the march of the hands round the face of the clock, whereas if the hours were struck the attention would at once be called thereto.

A CURIOUS illustration of the strength of what may, perhaps, somewhat loosely be called aristocratic ideas in the old coun-

try is afforded by a recent case in the Birkenhead County Court. A gentleman having engaged some one as his coachman, noticed for the first time that his Jehu had the effrontery to wear a moustache, whereupon he at once said, "I expect you to shave." Jehu, however, or his sweetheart, the report does not specify which, cherished the objectionable moustache more than he respected his master's prejudices, and determined that if the moustache must go, he would go with it. Thereupon he was dismissed, and brought an action for wrongful dismissal. The learned judge, however, upheld the master on the ground that it was an implied term of the service that the razor should be used pursuant to the directions of the master.

THE COST OF TWO COUNSEL.—In the case of *Llanover v. Homfray* Mr. Justice Peason made the following observations with reference to the taxation of costs upon the employment of two counsel: "I beg to state most distinctly I regret very much that there seems to be a disposition at the present time to cut down the costs of two counsel. I have heard it stated by other judges—and I entirely agree with it—that if that is to be done, I neither know how the leading counsel are to do their business properly, nor do I know how the junior counsel (and I say so with all respect to them) are to learn their business. As far as I am concerned, except in cases where really no leading counsel ought under any circumstances to be retained, I am certainly not disposed to cut down two briefs on taxation."

WE cordially welcome the second edition of Mr. Maclellan's annotated edition of the

## MATERIALS FOR A NEW BOUNDARY DISPUTE.

Ontario Judicature Act, 1881, by Thomas Langton, M.A., LL.B., of Osgoode Hall, Barrister-at-law. The well deserved reputation of the first edition, renders it almost unnecessary for us to say more than that the present one shows an increase in bulk. The work being by the same two gentlemen who produced the first edition, an increase of bulk will be rightly taken to imply an increase of value. The authors sum up the results of their labours in the preface, wherein they say: "The general form and arrangement of the former edition have been preserved, but in regard to some branches of procedure, which have now become better understood, the notes have been recast; and, in regard to many other branches, have been largely added to." At the commencement a tabular arrangement shows the relationship between the English rules of 1875 and 1883, and the Ontario rules. The supplemental Ontario rules have been added. Another useful feature is the notes appended to the Tariff of Costs, which is printed at length. These latter notes might no doubt have been made more extensive, but so far as they go they supply a *disideratum*. The Court of Appeal rules reappear with the latest decisions appended. A lengthy review of a new edition of so well-known a work as this is unnecessary. We can only hope that the industry of the authors will meet its fitting reward, not only in the gratitude of the profession, but also in the more substantial form of dollars and cents. It must, however, always be remembered that the pecuniary inducement to literary labour in legal matters is very small in this Province, and hence the more praise is merited by those whom industry and a love for their profession induce to embark upon them.

MATERIALS FOR A NEW BOUNDARY DISPUTE.

THE Order of the Imperial Privy Council defining the boundaries between the Prov-

inces of Ontario and Manitoba has been published. The Order materially enlarges the territory of Manitoba beyond the limits given to it by the Dominion Act of 1881 (44 Vict. c. 14), notwithstanding that the Imperial Act of 1871 vests in the Parliament of Canada the legislative jurisdiction to enlarge or alter provincial boundaries with the consent of the Local Legislature of the Province concerned. The Manitoba Boundary Act of 1881, read in connection with the Keewatin Act of 1876, (39 Vict. c. 21), makes the eastern boundary of the enlarged Province of Manitoba a *straight line* running "due north from where the western boundary of Ontario intersects the international boundary line between Canada and the United States." Where that intersection of boundary lines occurs *de facto*, must be *de jure* the point from whence the straight line of the eastern boundary of Manitoba commences its due north course. This intersection the award of the Judicial Committee places at the north-west angle of the Lake of the Woods; therefore, according to the Manitoba Boundary Act, the eastern boundary of that Province should start from that as the governing point "due north" to the centre of the road allowance on the twelfth base line of the Dominion Land Surveys, which twelfth base line is by the Act made the northern boundary of Manitoba. The Judicial Committee may not have had these Acts before them, or may not have had the assistance of a Dominion Land Surveyor, as the Arbitrators of 1878 had. After following the "due north line" of the Act of 1881 as far as the Winnipeg or English River, they make the boundary line diverge to the eastward through the centre of the Winnipeg, English and Albany Rivers, Lac Seul, and Lake Joseph, "until it reaches a line drawn due north from the confluence of the Rivers Mississippi and Ohio, which forms the eastward boundary of the Province of Manitoba." This description gives a large extent of Dominion

## THE MARRIED WOMAN'S PROPERTY ACT.

territory to that Province not included in the Manitoba Boundary Act. From this it would appear that either the boundaries set out in the Dominion Act have been varied, without Imperial or Dominion or Local legislation, or a new judicial interpretation has been given to the statutory expression, "*due north line*," by which such a line may not be a straight line, but may be given partly a due north course, and partly an irregular easterly course through rivers and lakes, "until it reaches a line drawn due north from" a place some hundred miles to the east of that named in the statute, and which the Lords of the Judicial Committee solemnly declare "forms the boundary eastward of the Province of Manitoba"—the statute to the contrary notwithstanding.

THE MARRIED WOMAN'S PRO-  
PERTY ACT, 1884.

ON the 1st July the Act passed at the last session of the Ontario Legislature, making further changes in the law regulating the rights of married women to their property, to which we adverted in our last issue, came into operation.

The Act is based as we have said mainly on the Imperial Statute 45 & 46 Vict. c. 75: it has however, some features peculiar to itself, and as it is an Act of great importance some further observation regarding its provisions and the changes it has wrought may be useful.

This Act repeals the R. S. O. chap. 125, and in effect considerably enlarges the rights of married women in respect to their property. The first section provides that a married women shall, in accordance with the provisions of the Act, be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property, as her separate property

in the same manner as if she were a *feme sole*, without the intervention of any trustee. It moreover provides that she may "make herself liable in respect of, and to the extent of her separate property" on any contract; that every contract of a married women shall be deemed to be made with respect to, and to bind her separate property, unless the contrary is shown; and moreover, that her separate property shall be bound which she may have at the date of the contract, or which she may at any time thereafter acquire.

By giving to the married woman the power not only of holding, but also of disposing, of her property, it would seem that the difficulty formerly found in the way of holding that separate property held under the Statute is not so completely her separate estate as property settled to her separate use has been removed. (See *Royal Canadian Bank v. Mitchell*, 14 Gr. 412.)

The Act, however, it will be observed still limits the liability of a married women in respect of her contracts to her separate property, and she is still apparently relieved from any personal liability thereon, and her contracts can consequently only be enforced by judgment against her separate property. The absurd result which was reached in *Pike v. Fitzgibbon*, 17 Ch. D. 454, to the effect that, under the former Act, only the property that she had at the date of the contract, and might still have at the date of judgment, could be made liable for the satisfaction of the contracts of a married women, we are glad to see has been corrected by the present Act.

How far it is expedient to limit the liability of a married woman on her contracts, to the extent of her separate property, we think is open to doubt. Freedom from liability to arrest might no doubt be conceded; but beyond that we do not see why a married woman should not in all other respects incur the same personal

## MARRIED WOMAN'S PROPERTY ACT.

liability in respect of her contracts as a man.

It is no doubt to property of some kind or other that a judgment creditor of a married woman must look for the satisfaction of his judgment; the personal remedy in general amounts to nothing, but the effect of limiting the liability to her property has been found by past experience to put difficulties in the way of recovering judgment against a married woman on her contracts, which we much doubt whether the present Act has removed. The contract being proved, there ought to be no technical difficulty in the way of recovering judgment upon it; the question, as to whether or not the married woman has any property out of which it can be satisfied, is a matter that ought not to affect the right to judgment. The creditor should be allowed to enter his judgment and should be left to resort, from time to time as the occasion might present itself, to such property of his debtor, as he might discover, liable to satisfy his debt. The courts in the past, however, have held that, owing to the property only, and not the person, of a married woman, being liable for her contracts, the creditor before he can get judgment must allege, and if denied, must prove that the debtor actually has separate property liable to satisfy the debt before he can get judgment. We fear the same difficulty may still be found to exist in recovering judgment under the new Act, notwithstanding property acquired subsequent to the contract is now made liable.

In the eleventh section, which is adapted from the twelfth section of the English Act, we experience the inconvenience which sometimes result from the divided jurisdiction of the Provincial and Dominion Parliaments. The English Act in the twelfth section provides for the remedies, by way of criminal proceedings, which a wife may have for the protection of her

property; but, owing to the Provincial Legislature not having jurisdiction in criminal matters, this part of the section is perforce omitted from the Ontario Act.

In the twelfth section of the Ontario Act we observe that a variance occurs between it and the thirteenth section of the English Act from which it is taken. The proviso at the end of the section that nothing in the Act shall operate to increase or diminish the liability of any woman married before the commencement of the Act for any debt, contract or wrong is in the English Act followed by the words "except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Act hereby repealed or otherwise if this Act had not passed"; but these words are, for some reason which we do not at present understand, omitted from the Ontario Act; and yet, it will be observed, the Act may very materially increase the right of married women to property. The Act repealed (R. S. O. ch. 125) was, as to women married on, or before, or since, 4th May, 1859, confined as regards personality to those married without a marriage settlement, and also as regards realty in the case of those married prior to 2nd March, 1872, to those who married without a settlement: in other words whenever there was a marriage settlement the Act gave no separate right of property to these two classes of married women. The Act of last session, however, practically removes this restriction, and gives all women, no matter when married, and whether with, or without, a settlement, right to property acquired subsequently to the passing of the Act; so that the omission of the exception in question from the end of the twelfth section appears to be a grave mistake.

The somewhat debated point as to whether, under the former Act, a married

## OUR ENGLISH LETTER.

woman could validly convey her real estate held under the Act without her husband being a party to the deed, has been set at rest by the repeal of that part of the R. S. O. ch. 127 sec. 3 which required the husband to be joined. That part of section 6 of R. S. O. ch. 126 which required the husband to join in a release of dower has also been repealed; but we observe section 7. of the same Act, which enabled a woman to give a power of attorney to release her dower, has been left unamended; this section concludes with the words "provided that the power of attorney is executed in conformity with said Act." The Act referred to bring the Married Woman's Real Estate Act, R. S. O. ch. 127, which requires the husband to be a party, unless an order dispensing therewith should be obtained. So that it may become a question, whether a husband is not still a necessary party to a power of attorney to release his wife's dower.

## OUR ENGLISH LETTER.

(From our own Correspondent.)

Now that the Bradlaugh case has come to an end, there is reason for apprehension that, until after the long vacation, there may be nothing to divert us in the courts except the vagaries of Mrs. Weldon. This good lady occupies, and probably will continue to occupy until she dies, a very considerable proportion of the time of the courts. It will be indeed strange if some rash penny-a-liner does not ere long comment upon her in a manner which she deems to be libellous, and if any one does, an action is the certain consequence. Now your correspondent is, to a certain degree, an admirer of Mrs. Weldon's ability in argumentative and eloquent appeal. She undoubtedly marshals facts clearly, and, at times, speaks with great persuasive force. But she has one fatal

defect, which is that she never can appreciate the difference between circumstances immaterial, and circumstances material, to her case. The consequence is that in every one of her actions her relations with M. Charles Gounod, and the unfortunate article in the *Paris Figaro* are dragged into unnecessary prominence. Hence it comes that Mrs. Weldon, when asked if she has any idea when she is likely to bring her case to a close, is generally compelled to answer, "My Lord, I never can tell." On the other hand she uses material facts cogently and well as the basis of sound argument.

A remarkable case was to-day exposed in the columns of the *Times*, illustrating in a strong way the infinite capacities for appeal of a common law case. One Mr. Smitherman, in an action against the South Eastern Railway, appears to have been twice successful in court of first instance, and twice to have been driven not only to the Court of Appeal, but also to the House of Lords. His present position is that a new trial has been ordered, and one really fails to see why there should ever be any end to the process. The strange thing is that the circumstances have been exposed, not by the plaintiff, but by the defendant's solicitor, who appears to feel much aggrieved at the fact that the plaintiff did not accept an offer made by the defendant's solicitor by way of compromise. Under the circumstances it is impossible not to think that some observations made by the Lord Chief Justice in the House of Lords last evening were apposite and necessary. In reference to a Judicature Acts Amendment Bill, he said that he was of opinion that the facilities given for appeal on the common law side were far too numerous. Nor was he without figures in support of his opinion, for he was able to show that since the Judicature Acts common law appeals had increased at least six-fold, while in

OUR ENGLISH LETTER.—WALTON V. MURDOCK.

[Cty. Ct.]

Chancery the appeals had only grown slightly.

Bankruptcy books continue to grow apace both in number and size. Two simultaneous second editions, one by Mr. Yate Lee and the other by Mr. Robson, are the biggest hitherto published, being very nearly as large as "Addison on Contracts." It is really a remarkable thing that the law upon one special subject should stand in need of so very much exposition, and yet one cannot say that there is an extra word in either work. But at this moment a remarkable document which purports to be an investigation into the operations of the new Bankruptcy Act. Coming as it does from the pen of the Inspector-General it necessarily eulogizes the recent enactment, but not even the ingenuity of an official of the Board of Trade speaking in Mr. Chamberlain's defence can get over the fact that in reality this precious new Act does not work at all. The cry against solicitors' costs under the ancient system is by this time become very stale, a sorry refuge for the desperate partisan, and Mr. Smith entirely fails to prove the main thing which is required of him, namely, that where the Board of Trade do the whole work formerly done by professional men, their charges are less than those which used to come out of the estate.

An uncommonly vulgar caricature of leading judges and barristers has been published, with a scriptural text to each name. Some of these quotations are exceedingly apposite.

LONDON, July 9.

THE Master-in-Ordinary has issued about thirty notices or warrants calling upon the litigants who appear to love "slow justice," to show cause, after vacation, why the delayed references in the Master's Office should not be deemed closed. The notices have been issued under General Order 584.

## REPORTS.

### ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

#### COUNTY COURT OF YORK.

##### WALTON V. MURDOCK.

*Creditor's Relief Act, 1880—Duty of sheriff to give notice—Attachment.*

The plaintiff placed a writ of *Fi. Fa.* goods in hands of the sheriff, who seized. The defendant paid the judgment debt and costs before sale, but more than twenty days after seizure by sheriff. The sheriff retained the money, and entered the notice under sec. 5, of Creditor's Relief Act. At the time of payment by defendant of the debt, no other claims in sheriff's hands—nor had defendant been served with notice of claims. *Held*, that sheriff ought not to have entered the notice under sec. 5, and that having detained the moneys until other claims came in, he was liable to attachment in not returning money to plaintiff.

Motion in County Court term, for an order for the issue of a writ of attachment against the sheriff of County of Essex, for not returning a writ against goods in above suit though ruled to that effect.

The facts sufficiently appear in the judgment of McDougall, J. J.:

This is an application for the issue of a writ of attachment against the sheriff of the County of Essex for not returning a writ of *Fi. Fa.* goods in this case. The sheriff was duly served with the usual three-days' rule, directing a return of the writ. This rule was served on 22nd May last.

The facts of the case appear from the affidavits to be briefly as follows: The plaintiff's solicitors forwarded the writ of execution against the goods of the defendant who lives in the County of Essex, on the 2nd of April last. The sheriff received it on the 4th April (as appears by the affidavit of his deputy), and a seizure of the defendant's goods was made upon the same day. Immediately after the seizure, the sheriff was served with a notice on behalf of two mortgagees who held each a chattel mortgage upon the goods of defendant. Thereupon, a correspondence ensued between the sheriff and plaintiff's solicitors, which resulted finally in the sheriff, on the 22nd of April, advertising the sale of goods under seizure. The sheriff at the same time instructed his own solicitor to take proceedings to interplead. Notice of motion to that end was served by the sheriff's solicitor, returnable on the 29th April. On the 29th April, the sheriff was paid by the defendant (or by some one for him) the debt and costs called for by the writ of *Fi. Fa.* goods. The sheriff instead of returning

Cty. Ct.]

WALTON V. MURDOCK.—SAUNDERS V. RAYNER.

[Cty. Ct.]

his writ, and sending the money to the plaintiff's solicitors, retained the money realized in the above manner and entered in his book the notice required by sec. 5 of the Creditor's Relief Act. After the 29th April and up to 29th May following, being within one calendar month, about six other claims made by other creditors of the defendant, were placed in his hands under the provisions of the Act. The question as to the rights of the parties, and the correctness of the sheriff's action in the premises are contested in this motion.

Section 5 of the Creditor's Relief Act, reads as follows: "In case a sheriff levies any money upon an execution against the property of a debtor, he shall forthwith enter in a book to be kept in his office for inspection without charge, a notice stating that such levy has been made, and the amount thereof; and such money shall thereafter be distributed ratably amongst all execution creditors, and other creditors whose writs or certificates given under this Act, were in the sheriff's hands at the time of such levy or who shall deliver their writs or certificates to the said sheriff, within one calendar month from the entry of such notice," etc.

Section 7 of the Act is to the following effect: "That if a debtor permits an execution issued against him to remain unsatisfied after seizure to within two days of the time fixed for sale or for twenty days after seizure, etc., then proceedings may be taken by creditors to lodge their claims with the sheriff under the Act, in the manner set out in Act.

Sub-section 32 of sec. 7, is in the following words: "In case the debtor without any sale by the sheriff pays the full amount owing in respect of the executions and claims in the sheriff's hands at the time of such payment and no other claim has been served on the debtor or in case all executions and claims in the sheriff's hands are withdrawn, and any claims served are paid or withdrawn, no notice shall be entered as required by the 5th section of the Act, and no further proceedings shall be taken under this Act against the debtor by virtue of the executions having been in the sheriff's hands."

The first point to be determined is at what stage of the proceedings, where a writ of execution is placed in the sheriff's hands does it become incumbent upon him to enter the notice under the 5th section of the Act. After seizure, or after making the money upon his writ?

Now as I read the 5th section, the sheriff is not required to enter this notice at all until he has money in his hands made by him under and by virtue of proceedings under his writ, that is to say realized by means of a sale of the debtor's goods under his writ.

The words are "levies money upon an execution," and further, "such money shall thereafter be distributed," etc

Still more must this appear to be the meaning of the Act for sub-sec. 32, of sec. 7, expressly provides for the case of the debtor forestalling the action of the sheriff by paying the judgment debt and costs to him without a sale taking place under the writ. In such a case if there are no other claims in the sheriff's hands at the date of any such payment by the debtor it is expressly enacted that "no notice shall be entered as required by the 5th section of this Act."

It is quite true, that any creditor in this case could have commenced proceedings under the provisions of the Act, before the 29th April, because the debtor had allowed the writ to remain unsatisfied for more than twenty days after such seizure, (sec. 7) but so far as the affidavits and material before me show no steps were taken by any creditor prior to the payment by the debtor of the judgment debt and costs on the 29th April. The only writ or claim in the sheriff's hands at that date was the plaintiff's under his writ. I think it was the sheriff's duty to have returned the writ and money to the plaintiff forthwith and not to have made any entry of the notice required under section 5. All the claims which came in, came in subsequently and doubtless by reason of the sheriff's giving the notice under circumstances when the statute expressly says, he should not do so.

The language of the statute seems to me to be free from all reasonable doubt. The construction which I have placed upon it, is I venture to think, the only interpretation which will enable section 5 and sub-sec. 32 of sec. 7, to be read intelligibly together and at the same time render each clause operative, sensible and consistent, the one with the other.

I think the order should go, but proceedings thereunder may be stayed for one week. Unless the amount of the plaintiff's execution and the costs of this motion be paid by the sheriff to the plaintiff herein within that time, order to issue.

### THIRD DIVISION COURT, COUNTY OF GREY.

SAUNDERS V. RAYNER.

*Equitable assignment of debt.*

Plaintiff sued as the holder of the following instrument, claiming that it had been delivered to him by M. for value: "I. O. U. the sum of sixty-eight dollars, value received to be paid on the first of March, 1884, (1/3/84) with interest at six per centum.

P. N. RAYNER."

Endorsed, "F. CAMPBELL."

Cty. Ct.]

SAUNDERS v. RAYNER.—SPOULE v. FERRIER.

[Cty. Ct.]

Defendant admitted that he had given the instrument to C. for value, but claimed that C. had delivered it to M. for a gambling debt, that before plaintiff had given value for it, C. notified plaintiff that it had been delivered to M. for a gambling debt and that he believed M. had cheated him and that he C. claimed the document and the debt evidenced thereby, that C. about the same time gave a similar notice to the defendant, and upon this suit being brought indemnified him against the costs. *Held*, upon the above statement of facts that there was a good equitable assignment of the instrument to the plaintiff, and that he was entitled to recover.

#### COUNTY COURT OF SIMCOE.

##### SPOULE v. FERRIER.

*Striking out statement of defence—Breaches of contract complained of not sufficiently set out—Pleading "Common Counts"—Judicature Act—Order for further particulars.*

Pleading the "Common Counts" is no longer admissible under the rules of pleading introduced by the Judicature Act.

[Barrie, January 25, 1884.]

This was a motion for an order to strike out certain paragraphs of a statement of defence, and was made before the Junior Judge of the County of Simcoe, at Barrie. The facts are fully stated in the judgment.

*H. Lennox*, for plaintiff.

*Lount, Q.C.*, for defendant.

Boys, J.J.—The statement of claim sets out that the plaintiff built a house for defendant, as per contract, and also did certain work and provided certain materials for defendant not included in the contract and claims a balance due of \$802.86 after allowing for admitted payments and goods supplied on account.

The defendant in answer puts in a "statement of defence and counter-claim," denying the allegations in the statement of claim and setting up payment and that the plaintiff agreed to perform the work in a good and workmanlike manner and to finish the same on or before a date mentioned, yet did not do so, causing the defendant great loss and damage. Also stating that by the contract sued on the plaintiff was to build the house on the same plan, of the same materials, and of the same size as certain houses named, with some exceptions also named, and the statement of defence then sets out "that the plaintiff failed to carry out the said undertaking and agreement and did not build the said house as agreed and did not have the said house finished by the said 1st day of September,

1882, whereby the defendant suffered loss and damages to the extent of not less than \$400."

Then follows—"The defendant says that the plaintiff, at the commencement of this action, was indebted to the defendant in an amount equal to the plaintiff's claim for money due," etc., being the common counts under the former practice for money due, goods sold, money lent, money paid, etc., with the usual termination "which amount the defendant is willing to set off against the plaintiff's claim." And the statement of defence ends with a payment into court of \$700.

I am now asked to strike out all the paragraphs of the defendant's statement of defence, except the one denying the allegations in the statement of claim, the one pleading payment, and the one pleading payment into court, on the grounds that the particulars in which the plaintiff failed to perform the work and the specific breaches complained of should be stated, and that the paragraph containing the common counts is defective in not being pleaded either as a defence or a counter-claim and as it does not give any particulars of the items of which it is composed and pleads matters of law instead of fact.

I think the paragraphs asked to be struck out are rather general in their allegations, but the remedy proposed by the plaintiff is too drastic considering the powers that exist to order amendments and the delivery of further particulars. The only doubt I have is regarding the common counts. At first I felt clear they could be allowed under the Judicature Act, but on further consideration it seems to me this feeling arose more from old familiarity and associations than from anything contained in the Act. Section 128, states that "Every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies. . . Such statement shall be divided into paragraphs, numbered consecutively, and each paragraph shall contain, as nearly as may be, a separate allegation; dates, sums, and numbers shall be expressed in figures, and not in words" (and see sec. 134). Now, in the common counts there are a number of separate allegations in the one paragraph, they are not numbered consecutively and each shows a separate cause of action or set off, so that at the trial, evidence might be given under this paragraph of matters as widely different as goods sold and money lent, or money paid for the use of the opposite party at his request, and money found to be due on a stated account embracing long and various dealings. Nor can such a form of pleading be said to "contain, as concisely as may be, a statement of the material facts on which the party

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pleading relies," for if money lent is relied upon, why mention goods bargained and sold? or if goods sold and delivered constitute the cause of action or set off, why introduce a statement about money paid for the use of the opposite party at his request? Any one of these statements may be as concisely made as possible, but if only one is going to be relied upon the introduction of the rest destroys the conciseness, and if more than one is, or the whole are, relied upon, then each should be divided into one or more paragraphs containing, "as nearly as may be, a separate allegation."

Then again, it seems to me that the O. J. Act contemplates such a concise statement of claim, set off or counter-claim, as will disclose with reasonable certainty and particularity, the material facts relied upon, such a statement at least which, if made upon a writ of summons, would amount to a sufficient special endorsement to enable final judgment to be entered in case of non-appearance. Now, a summons issued under the Judicature Act and endorsed with the common counts without dates or sums, would certainly not entitle the plaintiff, in case of non-appearance, to enter final judgment; for, as Cockburn, C. J., said in *Walker v. Hicks*, L.R. 3, Q.B.D. 8, "a party who is placed in the predicament of being liable to have a judgment signed against him summarily, is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist," and I think the same reasoning applies to a set off or counter-claim. It should be pleaded with sufficient particularity to enable the plaintiff to satisfy his mind whether he ought to go on with the action. Can it be said that a set off which does not disclose whether it is founded on money lent, goods sold and delivered or a general account stated, and without any dates or amounts whatever, does this? I think not.

It may be noticed, also, that the forms given in the Act all contain full particulars of the nature of the claim with dates and sums. These forms are not imperative but they are given as examples and the intention of the Act may fairly be deduced from them as requiring pleadings to be something of a similar character. If otherwise, why were they given at all?

I must, therefore, conclude that the form of pleading, known as the "common counts," is not now applicable to the procedure introduced by the O. J. Act, and the questions arise under this motion, should I strike out this paragraph or will an order to amend, and for particulars meet the case? And who should pay the costs? I see no objection to allowing the defendant to amend by separating any or all the counts he relies

upon into distinct paragraphs, with their proper consecutive numbers and adding thereto sums and dates and such other reasonable particulars as the nature of each claim will fairly admit of, and the order can also go for further particulars of the non-completion of the contract.

As to the costs, under ordinary circumstances a party pleading a statement of defence which is inadmissible, should pay the expense of having the statement struck out or amended, or of procuring an order for further particulars; but, as I understand, it has been usual to plead the common counts since the new procedure, and their admissibility has not been questioned before: the costs of the summons and order in this case will abide the event. On the question of costs each case will have, in a great measure, to be decided on its own merits, for there may be a difference between a pleading wholly made up of the common counts, and one in which the pleader, after having exhausted his facts and ingenuity in framing numerous statements of claim or defence, manifestly from force of habit, is unable to resist the temptation to throw in the common counts at the end, for what they are worth.

I see nothing in the objection to the common counts not being pleaded either as a defence or a counter-claim. The defendant's pleading is headed "statement of defence or counter-claim"; besides we have no rule requiring a party to state specifically that he relies upon any facts by way of set off or counter-claim, as they have in England.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

### COURT OF APPEAL.

GREEN V. WATSON.

*Patent—Assignment of patent right.*

The Court being equally divided the judgment of Ferguson, J., 2 O. R. 627, stood affirmed, and the appeal therefrom dismissed with costs.

*Robinson, Q.C., and Bethune, Q.C., for the appellant.*

*E. Blake, Q.C., and Cassels, Q.C., for the respondent.*

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NOTES OF CANADIAN CASES.

[Q. B. Div.]

PETRIE V. HUNTER.

GUEST V. HUNTER.

*Mechanics' Lien—Contracts and sub-contracts.*

The judgment reported 3 O. R. 233, affirmed with costs.

*Reeve*, for the appellant.

*Black*, for the respondent.

BEEMER V. OLIVER ET AL.

The judgment reported 3 O. R. 523, was affirmed on appeal.

*Moss*, Q.C., and *Fitch*, for appellant.

*Cassels*, Q.C., for respondent.

MCDONALD V. CROMBIE.

*Fraudulent judgment—Preference.*

The judgment reported 2 O. R. 243, affirmed on appeal.

*J. H. Macdonald*, for appellant.

*D. E. Thomson*, for respondent.

QUEEN'S BENCH DIVISION.

CORRIGAN V. GRAND TRUNK RY. CO.

*Negligence—Sufficiency of Railway Bill—Speed of trains in cities, etc.—Fencing track on highway—Contributory negligence.*

By the Consolidated Railway Act, 1879, every locomotive engine shall be furnished with a bell of at least thirty pounds weight, which shall be rung at the distance of at least eighty rods from every crossing over a highway, and be kept ringing until the engine has crossed the highway. The learned judge charged the jury, that the object was that a person passing at the crossing should receive warning of the approach of the train, and the bell must be such a bell as would reasonably give that warning.

*Held*, a proper direction.

By the same Act no locomotive shall pass through any thickly peopled part of any city, etc., at a speed greater than six miles an hour unless the track is properly fenced.

*Held*, that this applies as well to the crossing of a highway as to other parts of a city, etc., and that the defendants were guilty of a breach of the Act in running a train at a greater speed than six miles an hour across a highway

in a village where the only portion of the track not properly fenced, was that portion which crossed the highway.

The plaintiff was well acquainted with the locality in question, and had known it for many years as a dangerous crossing, but when approaching it in his waggon did not look along the track to see if a train was coming, though he could have seen the train in question in time to have stopped his horses before reaching the track. He did not see the approaching train until he was on the track, and it was too late to avoid being struck. The jury found for the plaintiff.

*Held*, that there was evidence of contributory negligence, and a new trial was directed.

KELSO V. BICKFORD.

*Railway company—Claim by president for services—Resolution of directors—Contract with company—Consolidated Railway Act—Novation.*

The plaintiff claimed a sum for services as President of the Grand Junction Railway Company, under a resolution of the Directors, and he alleged that the defendants had assumed the liabilities of the Company.

*Held*, that the Directors had no power to adopt such a resolution, it being a contract by the plaintiff, directly for his own benefit with the Company, and contrary to sec. 19, sub-s. 16 of the Consolidated Railway Act, 1879.

*Held*, also that, not being a valid claim against the Company, it could not be made a claim against the defendants by novation.

GILBERT V. GODSON.

*Agreement to excavate gravel—Reservation of land adjacent to fences—Right to lateral support for reserved land.*

The plaintiff agreed with the defendants that they should dig gravel from the plaintiff's pits, and the agreement contained the following clause: "I also reserve eight feet from line of fences to protect them."

*Held*, that the plaintiff was not entitled to lateral support for the eight feet so reserved, and, therefore, the defendants were not liable for damage caused by excavating up to, but not beyond, the eight feet limit.

*Tilt*, Q.C., for the plaintiff.

*J. K. Kerr*, Q.C., and *Neville*, for the defendants.

Q. B. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

## PORTEOUS v. MEYERS.

*Gratuitous bailment—Negligence—Liability of bailee.*

The plaintiff left a sum of money with the defendant, a shop keeper, for safe keeping. The money was put in a safe in the defendant's shop, but when the plaintiff applied for it the next day, the defendant told him that it had been taken out and he could not give it to him. On the evidence, the jury found, in answer to questions submitted to them, that the defendant was wanting in ordinary care and diligence in taking care of the money, in unlocking the drawer in which it had been placed, and leaving it unlocked while he went to the cellar to get goods for customers, who were then left alone in the shop, and that the money was lost through the defendant's negligence. They also found that the defendant wrongfully appropriated the money. Judgment was directed to be entered for the plaintiff upon these answers, and the court refused to disturb the judgment.

*Idington, Q.C., for the plaintiff.**Smith, Q.C., for the defendant.*

## SRIGLEY v. TAYLOR.

*Election—Disqualification for voting—R. S. O. c. 10, s. 4—Agent for the sale of Crown Lands—R. S. O. c. 24—The Public Lands Act, R. S. O. c. 23.*

By order in council, the defendant was appointed agent for the location and sale of lands under the Free Grant and Homesteads Act, R. S. O. cap. 24. By letter from the Crown Lands Department, the defendant was instructed to enter upon his duties respecting the location of free grants, but not to sell lands or receive money until he had given the usual security. By R. S. O. cap. 10, sec. 4, all "agents for the sale of Crown Lands," amongst other persons, are disqualified from voting at elections for the legislature, under a penalty. The defendant, before he had given the necessary security, voted at an election for the Legislature.

*Held*, that he was an agent for the sale of Crown Lands within the meaning of the Act, R. S. O. c. 10, s. 4, and, therefore, liable to the penalty imposed.

Whether or not the defendant was such an agent is a question of law and not a question for the jury.

*Arnoldi, for the plaintiff.**Osler, Q.C., for the defendant.*

## CHANCERY DIVISION.

Ferguson, J.]

[June 12.]

IN RE BIGGAR, BIGGAR v. STINSON.

*Will—Construction—Heirs—Children—Guardian of legacy—Trust.*

A testator bequeathed as follows: "I give and bequeath unto G. B. and her children the dwelling house they now occupy, the wife of C. R. B. and his children, appointing C. R. B. and G. B. joint guardians for the children above mentioned, and \$500, all transactions to be null and void unless sustained in writing by both guardians."

*Held*, that the children meant were those of C. R. B. and G. B., and there was a simple gift to G. B. and her children, who took concurrently; and C. R. B. and G. B. were, by the above clause, made trustees for their children, and could give a good acquittance and discharge for the \$500.

In another clause of his will, the testator willed and bequeathed "unto G. G. B.'s wife, E. B., \$5,500. This bequest is under the joint management of G. G. B. and his wife for their heirs; should there be none, then, at their death, to revert back to my heirs to be equally divided."

*Held*, that there was a trust of the \$5,500 reposed in G. G. B. and E. B.; that E. B. was entitled to the benefit of the trust during her life, and upon her death the benefit of it would go to any children there might be of G. G. and E. B., or any descendants there might be answering the description, "their heirs," and if there were no such children or descendants, then to the heirs of the testator to be equally divided amongst them.

Another clause was as follows:

"I will and bequeath unto M. R. B.'s wife and his heirs, \$5,000, and appoint M. R. B. as guardian and manager of this bequest."

*Held*, that a trust of the \$5,000 was thereby reposed in M. R. B., and "heirs" was merely descriptive of legatees intended. M. R. B.

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NOTES OF CANADIAN CASES.

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was entitled to receive the fund and hold it in trust. During his life, his wife would be entitled to the whole benefit arising from the fund, and on his death there would be a distribution of it amongst his wife or her representatives, as the case might be, and those persons who would answer the description of heirs of M. R. B., and M. R. B. as such trustee was entitled to receive, and could give a good acquittance and discharge for the money.

*Held*, lastly, that under the will in question, the widow was not put to her election.

*Smith*, Q.C., for the plaintiffs.

*McKenzie*, Q.C., for the adult defendants, other than the widow.

*J. Hoskin*, Q.C., for the infant defendants.

*A. Hoskin*, Q.C., for the widow.

Ferguson, J.]

[June 13

**BRYSON V. THE ONTARIO & QUEBEC RAILWAY COMPANY.**

*Contract—Improvidence—Married woman—Concurrence of husband—R. S. O. c. 125, s. 19—40 Vic. c. 7.*

Where a railway company contracted for the purchase of certain land with B., a married woman, in the absence of her husband.

*Held*, that the railway company were not under any obligation to see that she had independent advice in the matter; and inasmuch as the price appeared not to be grossly inadequate, and B. appeared to be fully *compos mentis*, and no unfair advantage having been taken of her, the agreement could not be set aside.

B.'s marriage took place in 1876, and the land was held by her to her separate use.

*Held*, that the concurrence of her husband in the contract was unnecessary, nor was it necessary for him to join in the conveyance.

The real estate of a married woman after March 2nd, 1872, whether owned by her at the time of her marriage, or acquired in any manner during her coverture, may be conveyed by her without the concurrence of her husband; and her contracts respecting such real estate are binding upon her.

*C. Moss*, Q.C., and *Dumble*, for the plaintiffs.

*Blackstock*, for the defendants.

Ferguson, J.]

[June 23.

**MCCARTHY V. COOPER.**

*Contract—Incomplete conveyance—Statute of Frauds—Specific performance.*

Action for the specific performance of an alleged contract for the sale of land.

It appeared that one W., whom C., the purchaser, supposed to be the owner of the land, but who was really only the agent of the owner, the present plaintiff, signed and sealed a conveyance of the land to the purchaser, similar to the ordinary short form of conveyance. This was also signed and sealed by C. There was no other note or memorandum of the alleged contract within the Statute of Frauds as would bind C. The deed acknowledged the receipt and payment of the purchase money, though the evidence showed it was not paid, but that only a deposit of ten per cent. was paid by C. It did not appear that the deed had ever been delivered.

*Held*, that the deed in question, though incomplete as a conveyance, yet was evidence of a contract of sale by the plaintiff, whose authorized agent, W., was shown to have been to C., sufficient to satisfy the Statute of Frauds, and the plaintiff was entitled to judgment.

*Blackstock*, for the plaintiff.

*Black*, for the defendant Cooper.

*Murray*, for the defendant Oliver.

Ferguson, J.]

**THE PHOENIX INSURANCE CO. V. CORPORATION OF KINGSTON.**

*Municipal law—Taxation of income of foreign corporation—Insurance—43 Vict. c. 27.*

Action to recover the amount of certain taxes paid under protest to the Corporation of Kingston.

The plaintiff's company is a foreign corporation, with its head office in London, England, but carrying on the business of Fire Insurance in Canada, with an agency office at Kingston, Ontario, and head-office for Canada in Montreal. The question was whether the insurance premiums received at Kingston by the agent of the company there, for insurance business transacted through him as such agent, were assessable at Kingston as taxable income or personal property against the com-

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pany and its said agent, or against the latter as the agent of the company, or against either of them.

*Held*, that the insurance premiums in question were personal property of the company, and, therefore, assessable under 43 Vict. c. 27, s. 3., and under that enactment, both the company and agent were properly assessed for the income, which the premiums constituted. And the fact that the premiums, having been previously sent by the agent, after collection, to the head-office in Montreal, were not in the municipality of Kingston, when the assessment was made, did not make any difference.

*Britton*, Q.C., for the plaintiff.

*Walkem*, Q.C., and *Agnew*, for the defendants.

Proudfoot, J.]

[June 25.]

BANK OF BRITISH NORTH AMERICA V.  
WESTERN ASSURANCE CO.

*Marine Insurance—Condition precedent—Adjustment—Double insurance—Contribution.*

Where by a certificate of insurance, representing and taking the place of a policy, it was provided, as the condition of payment, that all claims should be reported to the Union Marine Insurance Company of Liverpool as soon as the goods were landed or the loss known to be adjusted according to usages there, and the special condition of the contract of insurance.

*Held*, that the *adjustment* by the Marine Insurance Co. was not a condition precedent to the plaintiffs' right to recover. All that was required to be done by the insured was duly to report to that company the claim to be adjusted.

To constitute a double insurance there must be two or more insurances on the same subject, the same risk and the same interest, and variations in the several policies as to the extent of liability cannot be said to vary the risk.

If such concurrent policies have been taken, and subsequently cancelled without communication with and without the assent of another insurer, the remaining insurer is only liable for the rateable proportion of the loss. If, on the other hand, the several policies exist in full force at the time of action brought against one of the insurers, the defendant is liable for the whole amount of the loss, but has his remedy over against the other insurers for contribution.

*S. H. Blake*, Q.C., *Hardy*, Q.C., and *Wilkes*, for the plaintiffs.

*Bethune*, Q.C., and *R. M. Wells*, for the defendants.

Ferguson, J.]

[June 30.]

CARLING BREWING CO. V. BLACK.

*Assignee in trust for creditors—Notice of creditor's claims—Distribution—Liability of trustee.*

The defendant was assignee of B. in trust for creditors. After the assignment he got possession of B.'s books, and in the ledger saw that the plaintiffs were credited with a certain sum. B. also told him that the plaintiffs had sued him, and it appeared that writs of execution were in the sheriff's hands. The defendant inserted a notice in the local newspapers for creditors to send in their claims, and that he would distribute the estate on or before a certain day, having regard only to those claims of which he had notice. The plaintiffs did not send in their claim, but wrote to the defendant advising him of it, which letter the defendant admitted he received on the day of the distribution of the estate, but after he had sent off to the creditors bank drafts for their dividends. He made no effort to stop payment of the drafts.

*Held*, that the defendant had notice of the plaintiff's claim within the meaning of 46 Vict., cap. 9, sec. 1, and that he was liable to the plaintiffs for the amount of their dividend.

*Street*, Q.C., for the plaintiffs.

*Meredith*, Q.C., for the defendant.

Ferguson, J.]

[July 2.]

BECHER V. HOARE.

*Will—Mortmain Acts—Charity—Imperfect assignment.*

H. S., by his will, bequeathed certain pure and impure personalty to the London City Mission, voluntary charitable organization, and died in 1865. In 1866 A. S., his heiress and next of kin, sent a signed writing to the executor of the will, in which it was recited that doubts might arise whether the impure personalty passed to the executor in trust for the charity, declared her acquiescence, in what she said she knew had been the testator's intention, viz.: that the whole of the personalty, pure and impure, should be treated

by the executor as so passing to him, and renounced her rights thereto, and requested the executor to treat it all as so passing. In May, 1870, A. S. made a will devising and bequeathing all her real and personal property on certain trusts. In July, 1870, she informed the executor of H. S. that she had changed her intentions as to the matter referred to in writings of 1866 above mentioned, and she forwarded another will, dated July, 1870, in which she bequeathed all the property she had as heiress and next of kin to H. S. to J. R., and appointed the same person her executor as was executor of the will of H. S. J. R. died before A. S. In 1869, and in March, 1870, A. S. had written letters to the secretary of the London City Mission, in which she had expressed her intention of carrying into effect the intentions of H. S., as expressed in his will. A. S. died in 1877, and probate of her first will of May, 1870, was granted to the executors named in it.

*Held*, that the impure personalty could not pass by the will to the London City Mission, and the writing of 1866 and the letters to the London City Mission did not amount to such an assignment of it, as would pass it to the charity, inasmuch as the requirements of the Mortmain Acts were not complied with.

A gift by will of property that failed to take effect by reason of the Mortmain Acts, could not be aided or set up by the party entitled to the property by anything less than what would be required to constitute a good gift by such party of the same property to the party intended to be benefitted by the gift in the will.

There can be no marshalling of assets in favour of a charity.

As to the two wills of A. S., the bequest to J. R. by the second will lapsed by reason of her death before that of H. S., and the subject of it fell into the estate of A. S., so as to pass under the former will.

*Street*, Q.C., for the plaintiff.

*McGee*, for the defendant Hoare.

*Macbeth*, for the other defendants.

## COMMON PLEAS DIVISION.

Rose, J.]

### DURNIN v. McLENN.

*County Courts—Amount liquidated by act of parties.*

Action for \$228.20 being for a balance of a claim for \$1,828.20 the price of 8,310 lbs of butter at 22 cents per pound, less \$1,600 paid on account, as the next verdict was rendered for the plaintiff for the balance claimed; and the court refused to certify for costs.

*Held*, that the amount was liquidated by the act of the parties within the meaning of sec. 19, sub sec. 2 of R. S. O. chap. 43, the County Court Act, and therefore the plaintiff without a certificate was only entitled to County Court costs.

A motion to a judge for an order directing the defendant to pay to the plaintiff full costs without deduction or set off, was dismissed with costs.

*Osler*, Q. C. for the plaintiff.

*Aylesworth*, for the defendant.

Rose, J.]

### LUNEY v. ESSERY.

*Reference—Official referee—Special findings—objections to—O. J. Act, sec. 47.*

At the trial of an action a compulsory order of reference was made referring "all questions arising upon the pleading in their action between the parties, including all questions of account (if any)" to an official referee "for inquiry and report."

*Held*, that there was a reference under O. J. A., sec. 47.

Under sec. 47 the reference is not to be a final one, but for enquiry and report for the assistance of the court. The referee therefore had no power to give a general finding, but must especially find facts and all the questions referred.

In this case the referee having made a general finding for the plaintiff, the report was referred back to him to give its specific finding.

*Held*, also that objection to the special findings in a report must be raised by notice of motion.

*Watson*, for the plaintiff.

*Shepley*, for the defendant.

C. P. Div.]

NOTES OF CANADIAN CASES.

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Rose, J.]

QUILINAN V. CANADA SOUTHERN RY. CO.

*Pleading—Allegation—That work "negligently" done—Particulars—Mandamus—Compensation.*

The plaintiff by this statement of claim, claimed damages from defendant for "unlawfully, negligently and wrongfully" depressing certain streets in the town of Niagara Falls, and thereby making it inconvenient and almost impossible for persons to approach the plaintiff's store for business; also for "negligently, unlawfully and wrongfully" blocking up and rendering almost impassable the same street in the neighbourhood of the plaintiff's store, and thereby "negligently, unlawfully and wrongfully" preventing customers or other persons coming to the plaintiff's store, and almost entirely destroying plaintiff's business. And statement of claim further claimed, if the depressing or blocking up should be found to be lawful, that a mandamus should be granted requiring defendant to proceed to arbitrate to ascertain the compensation payable to plaintiff; or that it be referred to the proper officer to ascertain and state such compensation.

*Held*, on demurrer that the statement of claim was sufficient; that it is alleged that the work was negligently done, and this gives a cause of action, even though the work itself be lawful; and that if fuller particulars be required of the acts complained, this should be by motion.

*Quære*, whether a mandamus would be granted, for if the plaintiff was entitled to compensation, the proper remedy would apparently be by reference to the proper officer, as asked by way of alternative relief; also, whether it is necessary to allege that defendant's railway touches or takes a portion of the plaintiff's land; and, also, whether under the Railway Acts, defendants are only liable to make compensation for lands taken. As to these latter points, as the learned judge's judgment could not be reviewed until after the case would come on for trial, these objections were enlarged before the judge at the trial.

*Lash, Q.C.*, for the plaintiff.

*N. Kingsmill*, for the defendant.

Rose, J.]

[June 27.]

FEDERAL BANK V. HOPE.

*Motion for immediate payment—Promissory note—Agreement to renew.*

On the making of a promissory note it was agreed that the note should be renewed on payment of a named sum, "if the renewal notes are continued in the same form or names as at present." Since the making of the note the maker had died. In an action on the note the defendant set up as a defence such agreement, and alleged that he duly offered to perform the agreement so far as lay within his power by leaving the said note and liability of the maker and giving his own note in renewal as agreed as collateral to the said note, which tender the plaintiff refused to accept, and which the defendant is at all times ready and willing to carry out.

A motion for an order for immediate judgment under Rule 324 was dismissed, the judge refusing to decide as to the legality of the defence on such motion.

*Cattanach*, for the plaintiffs.

*Nesbitt*, contra.

## PRACTICE.

The Master in Chambers.]

[June 17.]

MOORE V. MOORE.

*Alimony—Costs—32 Vict. (O.) c. 18, sec. 2.*

An application to compel the defendant to pay the costs of the plaintiff's solicitors of an action for alimony.

The action was settled before trial, the plaintiff returning to live with the defendant, and the defendant agreeing to pay the plaintiff's solicitors' costs.

*Held*, that before the Act 32 Vict. (O.) c. 18, the defendant would have been liable to pay costs.

*Held*, under the wording of sec. 2 of the above Act, that the plaintiff had not failed to obtain a decree for alimony, and that the defendant is, therefore, liable to pay costs.

*Hoyles*, for the application.

*H. Cassels*, contra.

## LAW SOCIETY.

## LAW SOCIETY.

## EASTER TERM, 1884.

During this term the following gentlemen were called to the Bar, namely:—David K. I. McKinnon, with honours and gold medal; Alexander Mills, with honours and bronze medal; Messrs. Alexander W. Ambrose, Alfred Craddock, Edmund Sweet, William J. Code, William A. Dowler, Andrew C. Muir, Edwin R. Reynolds, Thomas B. Shoebotham, Charles H. Cline, James W. Hanna, Robert N. Ball, Gerald Bolster, Robert Christie, William Cook, Robert A. Pringle, Jos. Walker, Arthur W. Morphy, John W. Russell.

The following gentlemen received Certificates of Fitness: J. Bicknell, jr., D. M. McIntyre, A. Mills, W. Lees, W. A. Dowler, C. W. Colter, A. F. Godfrey, R. Christie, W. J. Code, A. W. Morphy, S. F. Washington, W. Wardrope, G. W. Danks, W. Johnston, C. C. Ross, J. G. Forgie, J. H. Hammond, R. O. Kilgour, T. B. Sheabotham, E. R. Reynolds, W. F. Sorley, F. G. Lilly, H. G. MacKenzie, L. H. Dickson, and J. J. McLaren, (special case).

The following gentlemen passed first Intermediate Examination, namely: J. M. Clarke, with honours, 1st scholarship; R. H. Collins, with honours, 2nd scholarship; Messrs. D. G. Marshall, D. A. Givens, S. McKeown, S. A. Jones, J. Clarke, J. S. Campbell, E. W. Morphy, R. C. Donald, J. Elliott, A. J. Arnold, W. H. Dean, G. R. O'Reilly, A. B. Cameron, A. W. Lane, A. C. F. Boulton, H. E. Ridley, J. F. Cryer, D. Coughlan, H. H. Dewart, D. C. Hossack, J. D. O'Neil, E. H. Ambrose, J. L. Peters, J. H. Burnham, A. C. Camp, H. Clay, W. F. Holmes, G. A. Loney, J. A. Macdonald, G. A. Payne, J. R. Shaw.

The following gentlemen passed second Intermediate examination: A. McLean, honours and 1st scholarship; R. Armstrong, honours and 2nd scholarship; S. Love, J. Armstrong, R. A. Dickson, W. N. Irwin, H. J. Wright, S. D. Biggar, E. W. Boyd, E. G. Graham, H. C. Fowler, P. McCullough, W. H. Blake, H. T. Kelley, A. J. Flint, T. Moffatt, F. C. Powell, H. W. Mickle, J. Baird, H. V. Greene, D. F. McMillan, A. W. Wilkin, N. A.

Bartlett, W. B. Raymond, E. A. Millar, J. A. McAndrew, W. C. Widdifield, E. Langtry, R. H. Hubbs, J. F. Grierson, W. D. McPherson, T. E. Griffith, S. J. Young, J. Shilton, R. J. Dowdall, H. L. Ingles, M. A. Evarrts, E. W. J. Owens, J. Smith, G. H. Stephenson, J. M. Duggan, W. T. McMullen, A. G. Campbell, O. E. Fleming, T. B. Lafferty, W. G. McDonald, M. Mitchell, W. H. Robinson.

The following gentlemen were admitted in the Society as Students-at-law:—

*Graduates.*—C. I. T. Gould, S. C. Warner, W. T. Kerr, Ernest Heaton, F. M. Field, Jno. A. Davidson, H. H. Langton.

*Matriculants.*—A. A. McMurchy, J. F. Edgar, A. L. Baird, J. A. Macdonald.

*Junior Class.*—A. McDonell, J. G. Gauld, C. D. Scott, H. Scott, H. F. Errett, J. G. Kerr, T. Graham, W. J. McKay, H. Millar, W. B. Scane, D. T. K. McEwan, C. Pierson, E. M. Lake, R. M. Thompson.

*Articled Clerk.*—R. Segsworth.

MONDAY, 19TH MAY.

Present—The Treasurer and Messrs. Becher, MacLennan, Kerr, Read, Crickmore, Murray, MacKelcan, Irving, Beaty, Foy, Cameron, and Hoskin.

The several reports of the Legal Education Committee were received and acted upon.

The Report of the Library Committee, as to the appointment of a successor to Mr. Williams, the late junior assistant, was received and read.

Ordered for immediate consideration and adopted.

Ordered that J. Daley be appointed junior assistant.

The report of the Library Committee as to the lending of books to students was received and read.

Ordered for immediate consideration and adopted.

Ordered that it be referred to the Finance Committee, to consider whether it be advisable to arrange with the government for the latter to heat the Society's part of Osgoode Hall, and if thought advisable to make arrangements for that purpose.

The letter of complaint of Mr. J. A. Macdonell was received and read. Moved by Mr. Cameron, seconded by Mr. MacLennan:—That while Convocation condemns as highly improper the publications in the newspapers by Mr. J. A.

## LAW SOCIETY.

Macdonell of the charge he has made against Mr. S. H. Blake, which he intended to bring before Convocation, yet as a grave charge is made by the communication laid before Convocation by the Treasurer, Mr. Macdonell be informed that he must submit the charge indicated by him in a formal shape, in writing, with such verification as he thinks fit, before any action by Convocation can be taken thereon. Carried.

A further communication and papers from Mr. J. A. Macdonell were received and read.

Ordered to be considered on Tuesday the 20th instant.

Mr. Leith's letter resigning his seat as a Benchman, was received and read.

Ordered that the resignation be accepted and that a call of the Bench be made for Friday, 30th May, to elect a Benchman in his place.

Mr. Maclellan called attention to the case of Mr. G. R. Sanderson who was called to the Bar when he (Mr. Maclellan) was chairman on 24th November, 1883. Mr. Sanderson's name was omitted by accident.

Mr. Maclellan now moves, seconded by Mr. Crickmore, "That Mr. G. R. Sanderson's name be inserted in the minutes of that day, as having been called to the Bar. Carried.

TUESDAY, 20TH MAY, 1884.

Convocation met.

Present—The Treasurer and Messrs. Crickmore, Read, Hardy, Pardee, J. F. Smith, Cameron, Hoskin, Bethune, Hudspeth, Kerr, Martin, Becher, Murray, MacKelcan, L. W. Smith, Irving, McCarthy, Ferguson, and Maclellan.

Mr. Hudspeth, moved the resolution of which he gave notice last term which was amended by consent and carried.

Mr. Murray, moved, pursuant to notice, that the following books, namely: Burton on Real Property, 1847; Sandars' Justinian, 1865; Main's Ancient Law, 1863; Kent's International Law, 1866; Lorimer's Institute's, 1872; MacKenzie's Roman Law, 1862; Powell's Law of Evidence, 1869; be placed in the book case to be lent to students under the general regulations.

On the letter of Mr. Macdonell, respecting certain proceedings in the Domin-

ion Parliament during the last session thereof, being read it was moved by Mr. Hudspeth, seconded by Dr. L. W. Smith: That Convocation having heard read the letter of Mr. Macdonell, of 12th April, 1884. It is resolved that the Bench decline to deal with the matter under the statute or otherwise, no charge having been made by any person against Mr. Macdonell, and Convocation having no power or jurisdiction over the case. Carried unanimously.

SATURDAY, 24TH MAY, 1884.

Convocation met.

Present—The Treasurer and Messrs. Crickmore, Maclellan, Moss, Murray, Bethune, J. F. Smith, Read, and Kerr.

Mr. Read moved, seconded by Mr. Crickmore, that Mr. E. Blake be elected Treasurer for the ensuing year. Carried unanimously.

Mr. Moss moved and it was ordered that the chairman of the Standing Committees, and Mr. Moss be appointed a committee to select and report names of members of Convocation for the various standing committees of Convocation for the ensuing year.

FRIDAY, 30TH MAY, 1884.

Convocation met.

Present—The Treasurer and Messrs. Irving Crickmore, Meredith, Ferguson, Foy, Murray, Moss, L. W. Smith, Read, Martin, Maclellan, J. F. Smith, MacKelcan, Kerr, Hoskin, and McCarthy.

Mr. Crickmore presented the Report of the Legal Education Committee on the Law School, comprising the report of the lectures and the examinations which was received and read.

Mr. Maclellan, from the Committee on Reporting, presented their report as follows:—

The Committee on Reporting beg leave to report.

1. The returns of the reporting in the Court of Appeal and in the Queen's Bench and Common Pleas Division, shew that there are no arrears.

2. In the Chancery Division there are still forty-six cases unreported in which judgments were given prior to the year 1884, forty-eight judgments given in the present year, are also unreported, and twenty-six cases have been issued since last term; there is, therefore, necessity for more active diligence on the part of the reporters.

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3. There are thirty-two practice cases unissued of a date prior to 1884, all of which are nearly ready but should have been published before this in order to comply with the rule of Convocation. There are forty-eight cases belonging to the present year in the printer's hands, and in a forward state of preparation.

4. The Committee regret that the expectation that the triennial Digest should have been published by this time should be disappointed, fifty pages are printed, seventy more in type, and its publication is confidently promised by the end of vacation.

5. The Committee have conferred with Mr. O'Brien on the subject of the early notes of cases in the Supreme Court in the same manner as he has heretofore done with the cases in the Ontario Courts, free of charge to Convocation so long as his present arrangement for printing notes of Ontario Cases is continued. Your Committee recommend the acceptance of Mr. O'Brien's proposal.

6. Mr. Grant has applied to your Committee for the sum of fifty dollars to pay for assistance obtained by him in completing volume twenty-nine of the Chancery Reports. And your Committee recommend that his request be granted.

All which is respectfully submitted.

(Signed) JAMES MACLENNAN.

May 30th, 1884.

The report was read and received. Ordered for immediate consideration, paragraph by paragraph.

The first, second, third and fourth paragraphs were adopted.

On the fifth paragraph, Mr. Ferguson moved in amendment to substitute the following:—That the Reporting Committee be requested to negotiate with the Editors of both the LAW JOURNAL and the *Law Times*, for the purpose of securing the publication, under the direction of the Society, of Notes of Cases decided in Ontario Courts and Supreme Court at a price equal to one half that heretofore paid to the LAW JOURNAL for the Ontario Notes, nothing being payable for the Supreme Court Notes, and to conclude an arrangement on this basis, with either or both if possible. The amendment was carried, and the amended clause inserted.

Clause six was adopted.

And the report as amended was adopted.

Ordered—That the Secretary be directed to call the attention of Messrs. Lefroy and Boomer, to the large number of cases in arrears in the Chancery Division, and of

Mr. Rolph, to the arrears in the Practice Reports, and to inform them that Convocation expects that these arrears will be cleared off forthwith, and that in future the work shall be kept up in accordance with the requirements of the Reporting Committee.

Mr. Maclelennan, from the select Committee, to strike Standing Committees, reports the following Standing Committees for 1884.

*Legal Education.*—Messrs. J. H. Ferguson, Charles Moss, John Hoskin, James F. Smith, Hon. T. B. Pardee, F. MacKelcan, John Crickmore, D. Guthrie, H. C. R. Becher.

*Library.*—James Bethune, Hector Cameron, James Beaty, D. McMichael, J. H. Ferguson, Charles Moss, Hon. S. H. Blake, John Bell, Æmilus Irving.

*Discipline.*—Dr. Smith, James Maclelennan, James Beaty, J. K. Kerr, Thomas Robertson, Edward Martin, D. McMichael, John Hoskin, Adam Hudspeth.

*Finance.*—J. J. Foy, John Crickmore, E. Martin, Hon. S. H. Blake, L. W. Smith, H. W. M. Murray, W. R. Meredith, Hon. A. S. Hardy, D. B. Read.

*Reporting.*—James Bethune, B. M. Britton, Hector Cameron, F. MacKelcan, D. McCarthy, James F. Smith, E. Martin, James Maclelennan, H. W. M. Murray.

*County Library Aid.*—Adam Hudspeth, Hector Cameron, W. R. Meredith, Thomas Robertson, B. M. Britton, Hon. A. S. Hardy, E. Martin, J. K. Kerr, and D. Guthrie.

*Journals of Convocation.*—Hon. C. F. Fraser, J. J. Foy, J. Maclelennan, Hon. T. B. Pardee, J. K. Kerr, John Hoskin, Chas. Moss, D. McCarthy, B. M. Britton.

The report was received and read.

Ordered to be considered forthwith and adopted.

The letter of Mr. S. J. Vankoughnet, enclosing a resolution passed at a meeting of the Bar, held on the occasion of the death of the late, Chief Justice Spragge, was read.

Mr. Irving moved, seconded by Mr. Maclelennan. That the minutes of the Bar meeting, on the occasion of the death of the late Chief Justice Spragge, and the communication transmitting same, be entered on the journal. Carried.

Mr. J. H. Morris, was elected a Benchman, in the place of Mr. Leith, resigned.

Mr. Murray, moved pursuant to notice, seconded by Mr. Moss, as follows:—That

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the use of the large Hall be allowed to the Osgoode Legal and Literary Society for the purpose of their annual dinner, and also that the use of the lunch room be allowed them for quarterly dinners, applications to be made from time to time to the Finance Committee, who shall have power to make such rules in the matter as they consider necessary.

Mr. Read, moved in amendment to strike out all after the words "annual dinner."

The main motion as amended was adopted.

Mr. Crickmore moved that Mr. Moss be appointed to represent the Society on the Senate of the University. Carried.

Mr. Martin moved, pursuant to notice, seconded by Mr. Read, that the portrait of Chief Justice Cameron be painted for the Law Society. Carried.

Mr. Murray moved, seconded by Mr. Smith, that Mr. Berthon be the painter of the portrait of Chief Justice Cameron. Carried.

The Treasurer withdrew and Mr. MacLennan was appointed chairman.

A letter was read from J. A. Macdonell, accompanied by a statutory declaration made by himself making certain charges of alleged misconduct against Mr. S. H. Blake. Moved by Mr. Murray, seconded by Mr. MacKelcan, and carried, that Convocation is of the opinion that the charge made by Mr. Macdonell against Mr. S. H. Blake is of such a character that it should be and is hereby referred to the Committee on Discipline to investigate and to report thereon to Convocation.

SATURDAY, JUNE 7TH, 1884.

Present—The Treasurer and Messrs. Moss, Murray, J. F. Smith, MacLennan, L. W. Smith, Morris, Hudspeth, Hoskin, Cameron, Foy, Ferguson, Kerr, Read, Irving, Bethune.

The report of the Legal Education Committee on the case of Mr. Murdoch was adopted.

Mr. L. W. Smith, pursuant to notice moved, seconded by Mr. Cameron. That notwithstanding any practice to the contrary the Secretary be instructed for the future, not to receive any notice after the period prescribed by the rules of the Society whether such notice be accom-

panied by the recommendation of a Benchman or otherwise. The motion was carried.

The following rule was read a first and second time.

Rule 25 is hereby amended by striking out the word "six" and substituting therefor the word "four."

The following rule was read a first, second and third time, and unanimously carried, namely:—

The Law School is hereby continued until the last day of Easter term, 1886, subject to the rules passed by this Society on the establishment of said School in Michaelmas Term, 1881, as amended by the rules passed in Easter Term, 1883.

The Treasurer withdrew.

Mr. Irving was appointed chairman.

Mr. Hoskin presented the report of the Discipline Committee which was adopted as follows:—

The Committee on Discipline to whom the complaint of Mr. Macdonell against Mr. S. H. Blake was referred for consideration, beg to report to Convocation that they notified these gentlemen to appear before them with their evidence, and that they appeared accordingly. Your Committee heard the evidence adduced, considered the matter and unanimously find that the complaint in question was utterly groundless, and that no case of professional or other misconduct has been made out against Mr. Blake.

All of which is respectfully submitted.

(Signed) JOHN HOSKIN, *Chairman*.

It was then moved by Dr. Smith, seconded by Mr. Bethune, and ordered,

That inasmuch as garbled statements of the proceedings before the Discipline Committee in the matter of the charges made against the Hon. S. H. Blake, seriously affecting that gentleman's position and standing, has found its way into the public press, the Secretary be authorized to furnish such of the papers as may desire to publish an authentic statement of the facts, a copy of the report of that Committee as adopted by convocation.

Mr. Hoskin from the Discipline Committee reported verbally on the case of the complaint against Mr. P. A. Hurd.

24TH JUNE, 1884.

Present—Messrs MacKelcan, Morris, Foy, Murray, Beaty, J. F. Smith, Mac-

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lennan, Guthrie, Hardy, Ferguson, Moss, Read, Crickmore, Kerr, Dr. Smith.

The Legal Education Committee reported, recommending that Mr. L. H. Dickson receive his certificate of fitness, and that Mr. C. Potter be permitted to withdraw his application for admission as a junior, and to present himself for admission as a graduate next term.

The report was adopted.

The finance Committee presented their report respecting the fees of Mr. Hurd and other matters.

The first clause was adopted. The consideration of the second clause was defined. The third clause was amended and adopted in amended form.

The letters from the Treasurer and Mr. Edward Harrison, were read.

On the motion of Mr. Hardy, seconded by Mr. Beaty, it was ordered, that a certificate under the Seal of the Society, signed by the Treasurer and Secretary of the Society, be issued to Mr. Harrison, setting forth the date and facts of his examination upon which he was admitted as a member of the Law Society in terms as nearly as possible the same as those of the certificate granted him by the Society upon such examination, the said Harrison having as he alleges lost such certificate and having applied for a duplicate thereof, and that the fee for such certificate be four dollars.

A letter from Mr. J. A. Macdonell was received and read, asking for copies of the proceedings on his charge against Mr. S. H. Blake.

On motion of Mr. Read, seconded by Mr. Hardy, it was declared that the application be not granted.

Mr. Moss' rule amending rule twenty-five by striking out the word "six" and substituting therefore the word "four" was read a third time, and carried.

Mr. Bethune's notice of motion relative to the refusal of witnesses to give evidence before the Discipline Committee was directed to stand for the second day of next term.

Mr. Murray gave notice of motion to amend rule 119, section 2.

Mr. MacKelcan gave notice of a resolution to apply to the Legislature of Ontario for power to examine witnesses on oath and compel their attendance, and the production of documents in all investigations

conducted under the direction of the Benchers of the Society.

Mr. Kerr gave the following notice of motion for the second day of next term:—That the Reporting Committee be instructed to take no further action upon the resolution passed at last session of convocation, respecting the publication of the notes of cases of Ontario Courts, and of the Supreme Courts, and that the 5th clause of the Report of the Reporting Committee then submitted be adopted.

Mr. Beaty gave the following notice of motion for the second day of next term namely:—That it be referred to a select Committee consisting of Messrs MacKelcan, Moss, J. F. Smith, Hardy and Foy (three of whom are to form a quorum) to consider and report what the practice has been or ought to be in reference to furnishing copies of petitions, evidence, and reports or any of them laid before any Committee of Convocation or Convocation to persons interested, who may apply for the same and on what conditions or terms if they should be furnished, or whether they or any of them should be furnished under any circumstances other than by the authority of a court.

Convocation adjourned.

#### ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Tenancy by the entirety.—*Central Law Journal*, March 7, and April 25.

Voluntary payments.—*Ib.*

Foreign judgments.—*Ib.*, March 14.

Workmen's risks on strangers' premises.—*Ib.*

Malicious prosecution of civil causes.—*Ib.*, March 28.

Proof of legitimacy.—*Ib.*, April 4.

Insanity in will contests.—*Ib.*, April 11.

Evidence in bastardy cases.—*Ib.*, April 18.

Mandatory injunctions.—*Ib.*, April 25, and May 2.

Assignment of life policies.—*Ib.*, May 2.

Argument of counsel.—*Ib.*, May 9.

Constructive notice.—*Albany Law Journal*, March 29, April 5.

Presumptions of negligence.—*Ib.*, April 12.

Common words and phrases.

Show—Indicate—Alley-way—Passenger ship—Live stock

—Running at large—Abide—Appendage—Present

time—Carriage—Business—Religious worship—*Al-*

*bany Law Journal*, April 12.

Manual labour—Harvest—Actually dwells—Beach—Up-

on—Rape.—*Ib.*, April 19.

Property in public lectures.—*Irish Law Times*.

April 5, and 12.

Negligent custody of title deeds by legal mortgagee.

—*Ib.*, April 26.

Legal costume.—*Ib.*

# Canada Law Journal.

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AUGUST 1, 1884.

No. 14.

## DIARY FOR AUGUST.

2. Sat.....Battle of the Nile, 1798.
3. Sun.....8th Sunday after Trinity.
6. Wed.....Duke of Edinburgh born, 1844.
10. Sun.....9th Sunday after Trinity.
12. Tues.....Primary Examinations.
13. Wed.....Sir Peregrine Maitland, Lt. Gov. U. C., 1818.
17. Sun.....10th Sunday after Trinity.
18. Mon.....Gen. Hunter, Lt. Gov. U. C., 1799.
19. Tues.....First Intermediate Examinations.
21. Thur.....Second Intermediate Examinations.
24. Sun.....11th Sunday after Trinity.
25. Mon.....Francis Gore, Lt. Gov. U. C., 1806.
26. Tues.....Solicitors' Examination.
27. Wed.....Barristers' Examination.
31. Sun.....12th Sunday after Trinity.

## TORONTO, AUGUST 1, 1884.

THE Ontario Bench has a large proportion of common law judges—some say it is “overweighted with common law.” In 1874 when the Court of Appeal was reorganized there were five equity men on the Bench—one in Appeal, three in Chancery, and one, Mr. Justice Gwynne, in the Common Pleas. In 1883, when a fifth Appeal Judge was added, there were only three equity men among the judiciary. The fifth Appeal Judge was to assist in the business of the High Court and “especially of the Chancery Division thereof.” Now there are only two judges who have had an equity training, while eleven have been taken from the common law bar, viz.: five in Appeal, three in the Common Pleas Division, two in the Queen's Bench Division (one judgeship vacant), and one in the Chancery Division.

THE question of the disputed boundary between Ontario and Manitoba has been settled by the Judicial Committee of the Privy Council; and the western limit given to Ontario in the Arbitration between the Dominion and Ontario, in 1878, has been held to be the legal boundary of

Ontario on the west. The dispute between the Dominion and Ontario as to the northern boundary of the latter was not submitted to the Judicial Committee.

## OUR ENGLISH LETTER.

(From our own Correspondent.)

DURING the whole of the past week the interest both on the public and the legal profession has been centred upon Charles Bradlaugh's trial at Bar. It is a noticeable fact that this peculiar and not altogether pleasant personage upon the modern political stage has a knack of presenting to the courts novel combinations of circumstances. When, for instance, he sued Mr. Newdegate for maintenance all the researches of some half-a-dozen men were unsuccessful in discovering a case exactly on all fours with Mr. Bradlaugh's. There are hundreds of cases in which contracts have been held void for maintenance and for champerty, but there is not a single case which runs parallel to Mr. Newdegate's except the case of *Wallis v. the Duke of Portland* reported in Brown's Cases in Parliament. There too a difference was to be found, for *Bradlaugh v. Newdegate* was a direct proceeding grounded upon the offence of maintenance, while the facts of *Wallis v. the Duke of Portland* were that the Duke of Portland had promised to pay the plaintiff a certain sum of money in the contingency of his successfully bringing an election petition against the sitting member for Colchester. The plaintiff founded an action on the promise, but the contract was held void on the ground that it involved maintenance. So, too, the present case is one of a novel

## OUR ENGLISH LETTER.

character, and the three presiding judges will have as much difficulty in explaining the law as the jury will find in deciding upon the facts. The case is certainly not one in which any prudent man would care to anticipate the decision of the Court; and, as a proof of the veracity of this statement, it may not be amiss to introduce a criticism which is attributed to the oldest and the most experienced of the law reporters. He looks forward, he says, to the realization of the dream of his life, which is to hear three judges sum up in triangular opposition to one another before a jury of whom no two will be in agreement. The presiding judges, Lord Coleridge, Baron Huddleston and Mr. Justice Grove are a good tribunal for the purpose. The second is, according to report, a thorough believer; the first has the religious feelings of a thoroughly respectable member of graceful society; the third is a man of science and an Agnostic. We had all hoped to listen to the summing-up on yesterday morning, but the sudden indisposition of the Chief Justice who has fallen a victim to lumbago has further delayed the end of a trial in which the agony had already been intensely prolonged.

The Privy Council are engaged in the consideration of a Canadian appeal upon a question of paramount importance to the profession in the shape of a case entitled *Reg. v. Doutrè*. There is a double question involved, firstly as to whether a member of the Canadian Bar is entitled to proceed by way of Petition of Right for the recovery of a quantum meruit for services rendered to the Crown, and secondly whether the rights of the parties are to be governed by the law of Quebec, Ontario, Nova Scotia or England. The circumstances are probably familiar to your readers, and consist in the fact that Mr. Doutrè, Q.C., was not satisfied with a fee of \$8,000 which was awarded to him for services in connection with the Fisheries

Commission in Nova Scotia. In this opinion he was supported by the Exchequer Court of Canada and also, nominally speaking, by the Supreme Court of the Dominion. That is to say, the Court consisting of six judges was equally divided, and judgment was therefore given for the respondent in the appeal.

The circuit question has at last received a final solution. For the future no more than ten judges will ever be absent from town simultaneously. That is a fact which has been known for some little time; but the ingenious system by which it is to be managed has only just been published and proven, if it proves nothing else, that the old system was a very bad one, and that the judges in council assembled are thoroughly familiar with the intricacies of Bradshaw's Railway Guide.

In touching on the case of Mr. Doutrè I missed an opportunity of mentioning another case of a purely English character with regard to the subject of recovering fees. A rather disreputable member of the English Bar has recently attempted to use the disciplinary jurisdiction of the Court with the view of enforcing payment of fees by a solicitor whom he alleged to have defrauded him. The solicitor in question gave a very different account of the circumstances, saying that the barrister had induced him to guarantee the payment by him (the barrister) of certain tradesmen's accounts in a town in the Midlands, and that he had retained the funds because, owing to the default of the barrister, he had been compelled to pay the money due. Mr. Justice Mathew characterized this as a most unwarrantable and discreditable attempt to use the disciplinary machinery of the Court for a thorough unrecognized and illegitimate purpose.

London, June 21.

Sup. Ct.]

NOTES OF CANADIAN CASES.

[Sup. Ct.

**NOTES OF CANADIAN CASES.**PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.**SUPREME COURT.**

Ontario.]

[June.

CANADA SOUTHERN RAILWAY CO. V.  
PHELPS.*Railway Company—Negligence—Damages—Fire  
communicated from premises of the company.*

This was an action commenced by the respondent against the appellants for negligence on the part of the appellants in causing the destruction of the respondent's house and out-buildings by fire from one of their locomotives. The freight shed of the company was first ignited by sparks from one of the Co.'s engines passing Chippawa station, and the fire extended to respondent's premises. The following questions, *inter alia*, were submitted to the jury, and the following answers given:—

Q.—Was the fire occasioned by sparks from the locomotive?

A.—Yes.

Q.—If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised?

A.—Yes.

Q.—If so, state in what respect you think greater care ought to have been exercised?

A.—As it was a special train and on Sundays, when employees were not on duty, there should have been an extra hand on duty.

Q.—Was the smoke stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind, or because it was out of order?

A.—Out of order.

Verdict for plaintiff, \$800.

On motion to set aside verdict, the Queen's Bench Division unanimously sustained the verdict.

On appeal to the Supreme Court.

*Held*, affirming the judgment of the Court below, that the questions were proper questions to the jury, and that there was sufficient evidence of negligence on the part of the appellants' servants to sustain the finding.

If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons by fire communicating thereto from property of the railway company themselves, which had been ignited by fire escaping from the engine coming directly in contact therewith.

*H. Cameron, Q.C., and Kingsmill, for appellants.*

*Bethune, Q.C., for respondent.*

**BADENACH V. SLATER.**

*Trust deed for benefit of creditors—Power to sell on credit—Not fraudulent preference.*

In a deed of assignment for the benefit of creditors the following clause was inserted: "And it is hereby declared and agreed that the party of the third part, his heirs, etc., shall, as soon as conveniently may, collect and get in all outstanding credits, etc., and sell the said real and personal property, hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents." *B. et al.*, who were execution creditors of the assignors, attacked the validity of the assignment to S. No fraudulent intention of defeating or delaying creditors was shown.

*Held* (affirming the judgment of the Court below), that the fact of the deed authorizing a sale upon credit did not, *per se*, invalidate it, and the deed could not on that account be impeached as a fraudulent preference of creditors within the Act R. S. O., cap. 118.

Appeal dismissed with costs.

*Gibbons, for appellant.*

*Foster, for respondent.*

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[Sup. Ct.]

**NEILL V. THE TRAVELLERS' INSURANCE CO.***Policy—Condition—Voluntary exposure to unnecessary danger.*

The plaintiff (appellant) brought an action to recover upon a policy of insurance effected by the respondents upon the life of her deceased husband, J. N., who met his death during the currency of the policy from being run over by a train of cars upon one of the lines of the Northern Railway through the company's yard at Toronto. In answer to the plaintiff's claim the respondents set up the following amongst other defences:—

By their fourth plea, they invoked a condition to which the policy sued on was subject, to wit: "no claim shall be made under this policy when the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, hazard or perilous adventure." The uncontradicted evidence was that the deceased was killed by the train coming against the vehicle in which he was driving alone on a dark night in what was called a network of railway tracks in the company's station yard at Toronto at a place where there was no roadway for carriages.

*Held* (affirming the judgment of the Court below, 7 App. R. 670), that the undisputed facts established by the plaintiff shewed "that the deceased came to his death in consequence of voluntary exposure to unnecessary danger," and that, therefore, respondents were entitled to a non-suit.

*Lash*, Q.C., for appellant.

*Robinson*, Q.C., and *D. McCarthy*, Q.C., for respondents.

**STAMMERS V. O'DONOHUE.***Vendor and purchaser—Specific performance—Contract—Vendor's name.*

This was an appeal from a judgment of the Court of Appeal for Ontario, confirming a decree of the Court of Chancery, ordering specific performance of a contract of sale alleged to have been entered into between the parties under the circumstances stated in the report of the case (28 Gr. 207).

*Held*, that although the vendor's name was not mentioned in the agreement signed by the auctioneer, the subsequent letters of the vendor

and his admissions were sufficient to constitute a complete and perfect contract between the appellant as vendor and respondent as purchaser within the statute of frauds.

*O'Donohue*, Q.C., appellant in person.

*Bain*, Q.C., for respondent.

Manitoba.]

**SINNOTT V. SCOBLE ET AL.***Permits to cut timber (Man)—Rights of holders of—Dominion Lands Act, 1879, sec. 52.*

On the 21st November, 1881, *S. et al.*, obtained a permit from the Crown Timber Agent, Manitoba, "to cut, take and have for their own use from that part of Range 10 E., that extended five miles north and five miles south of the Canadian Pacific Railway track, the following quantities of timber: 2,000 cords of wood, 35,000 ties—permit to expire on May 1st, 1882." A similar permit was granted to *M. Sinnott & Co.*, dated 10th February, 1882, authorizing the cutting, removing, etc., of 25,000 ties. In February, 1882, under leave granted by an order in Council of 27th October, 1881, *S. D. & T.* cut timber for the purposes of the construction of the C. P. R. from the lands covered by the permit of 21st November, 1881. *S. et al.*, by their bill of complaint, claimed to be entitled by their "permit" to the sole right of cutting timber on said lands until the first of May, 1882, and prayed that the defendants, *S. D. & T.*, be restrained by injunction from cutting timber on said lands, and be ordered to account for the value of the timber cut. *S. D. & T.* justified their acts under the order in Council of 27th October, 1881, and denied the exclusive possession or title to the lands or standing timber.

*Held* (affirming the judgment of the Court below), that the holders of "a permit" as the one question are not, during its currency, vested with any enforcing power, or rights to the possession of the lands or the standing timber, and that *S. et al.*'s permit amounted to no more than a permission or right to enter on the land and cut the quantity specified on the permit.

*McCarthy*, Q.C., for appellants.

*H. Cameron*, Q.C., and *Kennedy*, for respondents.

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[Ct. Ap.]

## COURT OF APPEAL.

## RE ALGOMA ELECTION.

*Practice—Striking out improper statements in petition.*

It is the duty of the Court to prevent as far as possible the introduction of the heated language of the election contest into its formal proceedings. Therefore, where, on a motion to a Judge in Chambers, six paragraphs of the petition had been ordered to be expunged on the ground that they contained charges of gross corruption against persons not parties to the proceeding and which, if true, evidence thereof could be given on the trial under other paragraphs of the petition, it appeared on an appeal from the order of such Judge that in another paragraph (the 12th), a charge was made against the returning officer of having purposely placed one of the polling places in an inconvenient locality, by reason of which many voters were prevented from voting; alleging that the returning officer did not act impartially, "but, on the contrary, had lent himself to and became and was the pliant and subservient tool of the said" (naming certain members of the local Government) "or some or one of them and improperly acted under their directions and instructions, with a view to and for the purpose of aiding in the election of," etc., the Court did not feel itself confined to those matters which the respondent thought it necessary in his own interests to bring to their notice, and, in dismissing the appeal, ordered the objectionable portion of such 12th paragraph to be struck out and the appellant to pay the costs of the motion and of the appeal from the order made thereon.

*McCarthy, Q.C., for the appeal.*

*Bethune, Q.C., and Johnston, contra.*

## MAGURN V. MAGURN.

*Husband and wife—Alimony—Counsel fees.*

A judgment had been given declaring the plaintiff entitled to alimony from her husband, who thereupon appealed to the Court of Appeal. On motion of the plaintiff an order was made by Osler, J. A., directing the husband to pay a sufficient sum to cover the fee necessarily payable by the wife to her counsel, although

if it became necessary to reconsider the practice of ordering the husband to pay his wife's disbursements in suits of this nature he would be strongly disposed to think that, owing to the altered status of married women, the reason for it had ceased to exist.

*Langton, for the application.*

*C. Millar, contra.*

## O'SULLIVAN V. HARTY.

*Administration—Agent of Administrator—Costs.*

In 1876 J. F. O'S. died intestate in New Brunswick, and the plaintiff—his brother—endeavoured to obtain the administration of his estate, but, owing to his financial position, he was unable to do so, until the defendant, W., and one J., consented to become security for him, which they did on being indemnified. Letters were accordingly granted to him, and the several securities belonging to the estate converted into money, except some English railway stock, which was handed over to the defendants, but which the plaintiff declined to assist them in realizing. In pursuance of an agreement to that effect, proceedings were instituted in one of the Probate Courts in England with a view of ascertaining the next of kin and to obtain a final decree for the distribution of the estate, when it was ascertained that six other persons were so entitled, and on the taking of the accounts in July, 1878, it appeared that each was entitled to \$1,135.11, but owing to the plaintiff's continued refusals to join in disposing of the scrip, the defendants, in whose hands the funds of the estate had been deposited, were unable to settle with the several persons entitled. The plaintiff made a claim of \$2,500 upon the estate for his commission and expenses incurred in getting in the estate, and in November, 1880, filed a bill to compel the defendants to pay \$1,000 commission and his share of the estate, and also to hand over to him the shares of the other next of kin. At the hearing a decree was made declaring the defendants entitled to their costs as between solicitor and client and ordering the plaintiff to execute all papers necessary to dispose of the railway stock; directed the defendants within two months to settle with the next of kin, other than the plaintiff, and if, after settling with the next of

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kin, a balance should remain in their hands, they should pay such balance to the plaintiff.

*Held*, that the defendants were in reality agents for the plaintiff, and on no principle of fair dealing ought the other persons interested in the estate be called upon to pay the costs of the litigation, and the same were properly payable from the share of the plaintiff in the fund.

*Bethune, Q.C.*, and *Whiting*, for the appeal.

*Moss, Q.C.*, and *O'Sullivan*, contra.

From Chy. Div.]

### TRINITY COLLEGE V. HILL.

#### *Mortgage—Absent defendant—Service.*

Where proceedings were instituted in 1876 against persons interested in a mortgage estate, one of whom was resident out of the jurisdiction, and the usual decree and account was made and taken; and the application to make such decree absolute was not made until May, 1882, and in the early part of the month following a petition was presented praying that the defendants might be allowed to redeem, alleging the ignorance of the absent defendant of the proceedings until his return to the country, a few days before signing the petition, and the ignorance of both defendants of any proceedings subsequent to the filing of the bill; and that the defendant upon whom the bill was served was about ninety years old and of feeble intellect, unfitted to transact business.

It was shown that in March, 1882, before the order making the decree absolute, the plaintiffs had sold to one Grattan, who bought, relying on the plaintiff's title under the final order of foreclosure which, on its face, was expressed to be subject to the general orders of Chancery 114, 5, 6.

Under the circumstances the Court (reversing the order of *Boyd, C.*) made an order to open the foreclosure on the usual terms of paying principal, interest and costs of plaintiffs and of the purchaser (not including any costs of the appeal, of which each party should bear their own), together with any costs incurred by the purchaser in connection with his purchase of the property, and in default of payment on or before 1st October next, appeal to be dismissed with costs.

*Bain*, for appeal.

*Vankoughnet, Q.C.*, and *Hoyles*, contra.

### DUNLOP V. DUNLOP.

#### *Conveyance obtained by undue influence.*

In an action to restrain waste it was shown that the plaintiff obtained from his father a deed of the premises in question, the father, however, swearing that he supposed when executing the document that it was his will he was making, and the conveyancer who prepared the deed admitted in his evidence that he might have suggested to the subscribing witness not to talk too much to the old man about the writing, as perhaps he would not sign it; and the deed as prepared was silent altogether as to certain provisions and payments that were to be made, as alleged by the plaintiff. The Court reversed the Decree pronounced by the Court below, ordered the bill to be dismissed with costs, and the deed to be delivered up to be cancelled.

*G. T. Blackstock*, for the appeal.

*Edwards*, contra.

### REGAN V. WATERS.

#### *Surrogate Court—Mental capacity.*

On the trial of an issue, directed by the Surrogate Judge, before a jury, evidence was given as to the mental capacity of the testator by persons acquainted, and having frequent intercourse, with him, the grant of probate being opposed by the widow on the ground, amongst others, of mental incapacity. The judge at the trial being of opinion that the witnesses examined were not of a class qualified to give scientific evidence withdrew the case from the jury, and gave judgment in favour of the plaintiffs, granting probate of the will, which he afterwards refused to set aside. On appeal, a new trial was directed and the costs of appeal ordered to be paid by the plaintiffs, as the opinions of such witnesses might "be of more or less value according to their skill, or experience or aptitude for judging of such matters all which tests would be applied by the jury; and mere opinions unsupported by facts justifying them would be rejected altogether without reference to the witness being called as an expert or not professing to speak in that somewhat indefinite character."

*McCarthy, Q.C.*, for appeal.

*R. M. Meredith*, contra.

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**MCDONALD v. BULLIVANT.***Mortgage, etc.—Merger.*

The defendant had created a mortgage on certain lands, which he subsequently conveyed to one P., the conveyance being silent as to whether it was a sale of the equity of redemption merely or an absolute sale, the payment of the mortgage being part of the consideration. The defendant subsequently became insolvent and included this in his schedule as an indirect liability, and the mortgagee obtained from P. an assignment of his interest to his wife in order, as he stated, to prevent a merger.

In a proceeding by the mortgagee against the defendant an award was made in favour of the plaintiff, which the defendant moved to set aside. The motion was refused by Galt, J., and on appeal to this Court that judgment was affirmed with costs.

A. Hoskin, Q.C., for the appeal.

W. Cassels, Q.C., contra.

**MCEWAN v. MCLEOD.***Practice—Interest on judgment.*

Where an appeal is made against a judgment in any personal action which is affirmed on appeal, interest is allowed for such time as execution has been stayed by the appeal; but where the plaintiff refrained from entering up his judgment until after the decision in appeal, this court refused to order interest to be allowed on the amount of the verdict; leaving the plaintiff to apply to the Court below for relief by entering the judgment *nunc pro tunc*.

Aylesworth, for the application.

Holman, contra.

**HUGHES v. BOYLE.***Appeal bond—Costs on discontinuing appeal.*

Where appeal proceedings are abandoned by giving notice of discontinuance, the respondent, if he desires, may proceed, upon the bond given as security to effectually prosecute the appeal, to recover his costs from the sureties of the appellant. He is not obliged to apply to the Court below and sign judgment for them there against the appellant.

Donovan, for the appellant.

C. Millar, contra.

From Co. Ct., York.]

**PALIN v. REID.***Innkeeper—Gratuitous bailee.*

The plaintiff had been for some time a guest of the defendant—an innkeeper—and on leaving the inn after paying his bill, left a box containing some papers and books alleged to be of value to the plaintiff, in the room of the inn used for storing baggage, etc., the plaintiff intending to take it away the day following, but owing to the illness of the plaintiff he did not call for it for several weeks afterwards, when it was discovered that the box was lost. The plaintiff was not to pay anything by way of storage, etc., and it was shown that defendant had not been guilty of any negligence in the matter. In an action brought to recover the value of the box and contents at the trial before Burnham, J. C. C. O.—sitting for the judge of the County of York—a verdict was entered for the defendant, which, in the following term, was set aside by the learned Judge and a verdict entered for the plaintiff for \$50.

An appeal from this judgment was allowed with costs, and the rule to set aside the verdict discharged with costs.

Osler, Q.C., and O'Sullivan, for the appellant.

Delamere, for the respondent.

From Co. Ct., York.]

**GODDARD v. COULSON.***Mechanics' Lien.*

The defendants contracted with one C. for the execution of the stonework upon certain buildings. C. never completed the work, but during the progress thereof was paid in good faith sums exceeding the value of the work actually done by him on the building before he abandoned the contract.

Held (reversing the judgment of the learned Judge of the Court below), that a sub-contractor with C. could not enforce payment of his claim out of the ten per cent. reserved under the Act 41 Vict. ch. 17, sec. 11, as security for the payment of the claims of sub-contractors.

Ritchie, for the appeal.

Snelling, contra.

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From Co. Ct., Perth.]

FARROW v. TOBIN.

The defendant, as bailiff of a Division Court, seized two horses, waggon, etc., of the plaintiff under an execution against another person, which, on an interpleader proceeding were decided to be the goods of the plaintiff, and at the end of three weeks plaintiff obtained possession of them from the bailiff. In an action brought by the plaintiff against the defendant for damage done to the horses during the time they were in his possession, the jury, under the direction of the judge, found a verdict for the plaintiff and \$80 damages, which verdict the judge subsequently refused to set aside.

*Held* (affirming the judgment of the County Court), that the finding of the judge on the interpleader proceedings formed no ground of defence to the suit for damages for the alleged injury to the property.

*Woods*, for the appeal.

*Smith*, Q.C., contra.

From Co. Ct., Grey,]

HARRIS v. MOORE.

*Oral evidence to explain agreement—New trial—Discretion of judge.*

The plaintiffs agreed to sell to the defendants a water-wheel, "and place the same in position" for \$150, but the defendants refused payment upon the ground that the wheel had not been properly placed, and did not, in fact, perform the work stipulated for. The jury rendered a verdict in favour of the defendants, which the judge of the County Court set aside and directed a new trial—costs to abide the event. On appeal this Court refused to interfere with the discretion of the Judge of the Court below considering that the term "placed in position" was so indefinite that the defendant was at liberty to show what was meant thereby; the writing, by such parol evidence, not being added to or varied, but only rendered intelligible. Under the circumstances the Court refused to make any order as to the costs of the appeal.

*Falconbridge*, for the appeal.

*Creasor*, Q.C., contra.

From Co. Ct., Perth.]

WEINHOLD v. KLEIN.

*Lease of lands—Agreement as to allowance out of rent by reason of thistles being in the fields.*

The plaintiff rented to the defendant a field for the purpose of growing flax at an agreed rental of \$10 an acre. In answer to the claim for rent, the defendant attempted to show that he had sustained damage by reason of the ground being full of thistles, and that an allowance was to be made for the thistles.

*Held* (affirming the judgment of the Court below), that the jury were properly told, for their guidance in adjusting such allowance, how the defendant had himself settled with other persons who had thistles in their flax fields.

*Woods*, for the appellant.

*Osler*, Q.C., for respondent.

From Co. Ct., Halton.]

McKINDSEY v. ARMSTRONG.

*Garnishee proceedings.*

E. A. conveyed lands and chattels to one B. upon trust to convert the same into money, to pay debts, etc., and as to any balance remaining upon trust to pay the same to R. A., son of E. A., or if the party of the second part (B) should see fit he might invest the same in the purchase of a homestead and convey the same to R. A., his heirs, etc.

*Held* (reversing the judgment of the Court below), that there was not any debt due from B. to R. A. that could be garnisheed by the creditors of R. A.

*Aylesworth*, for appeal.

*Beaty*, Q.C., contra.

From Co. Ct. Waterloo.]

McLEAN v. BRETHAAPT.

*Stoppage in transitu—Seizure of goods sold under execution.*

The plaintiff sold W. G. a quantity of leather, which was to be sent by plaintiff to the purchaser by railway. The shipping bill contained, amongst others, the following condi-

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tions: "In all cases . . . the delivery of goods will be considered complete and the responsibilities of the company shall terminate when the goods are placed in the company's shed or warehouse . . . when they shall have arrived at the place to be reached upon the railway of the company. The warehousing of them will be at the owner's risk"—who was to be liable for any charges for storing them otherwise than in the warehouse of the company. "Storage will be charged on all freight remaining in the depots over forty-eight hours after its arrival."

While the leather remained in the warehouse of the Railway Company, the purchaser requested that it might be stored by the company's servants, he agreeing to pay—but not paying—the charges for freight thereon, and subsequently the sheriff paid the charges thereon, seized the leather and removed the same from the stores of the Railway Co. under a writ of attachment sued out by the defendants.

*Held*, that this did not deprive the vendor of his right to stop the goods in transitu.

*Robinson*, Q.C., for the appeal.

*J. K. Kerr*, Q.C., and *A. Galt*, contra.

From Co. Ct., Middlesex.]

GARNER V. HAYES.

*Contract.*

One M. agreed with the defendant for the erection of a dwelling house for the defendant in two months from date, and if M. neglected to build the house defendant was to be at liberty to purchase material and employ workmen to finish it and deduct cost of material, etc., out of the contract price. The plaintiff agreed to supply M. with lumber to be used in the building, and M., after a portion of the lumber had been placed in the building, gave plaintiff an order on defendant for \$341.46 "for lumber used in your house, one month after the building is completed," which the defendant accepted. M. failed to complete the building, and the defendant did so in accordance with the terms of the agreement.

*Held* (affirming judgment of the Court below), that to the extent of the balance of the agreed price for the building remaining in defendant's

hands, he was liable to pay the plaintiff, notwithstanding M. did not complete the building, the terms of the order including lumber which had previously been used in the building as well as that subsequently placed therein.

*Macbeth*, for the appeal.

*R. M. Meredith*, contra.

# QUEEN'S BENCH DIVISION.

Cameron, J.]

[May 7.]

SHAFFER V. DUMBLE.

*Replevin—Detention—Conversion—Evidence—Married woman—Gift by husband—Separate estate—R. S. O. c. 125.*

The plaintiff was executor of H. D., widow of T. D., whose executor the defendant was. The plaintiff claimed a piano in the house lately occupied by the widow, of which the defendant had the key. At an interview between the plaintiff and defendant, the latter claimed the piano, but said he was willing to leave the question of the ownership to a person to be named. The plaintiff left him, promising to write, and afterwards did write, saying he had decided to bring the matter before the proper court. Subsequently the plaintiff's solicitor wrote the defendant offering to release all demands upon the defendant giving up all claim to the piano, to which the defendant's solicitor answered that he could not comply with the demand. The defendant commenced an action, in which the title to the piano would come in question. The plaintiff's solicitor having again written to ask whether possession of the piano would be given, the defendant's solicitor wrote that it was perfectly safe where it was, and that the action commenced would decide the question. He also wrote that the plaintiff would not have to put the law in motion.

*Held*, in an action of replevin, assuming the piano to be the plaintiff's, that there was no evidence of trespass or conversion to support the affirmative of the issue that the defendant did not take or detain the piano.

The evidence showed that the husband had purchased the piano and had made a present of it to his wife by putting it in the house where

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they lived, and subsequently recognizing her right to it.

*Held*, that the piano did not form part of the wife's separate estate, as the husband could not at common law make a gift *inter vivos* of this description of property, so as to prevent its passing to his personal representatives, and that there was no evidence of an intention on his part to constitute himself a trustee of the piano for his wife.

*Riddell*, for plaintiff.

*J. W. Kerr*, for defendants.

#### CHANCERY DIVISION.

Div'l. Ct.]

[June 19.]

#### CAMPBELL V. COLE.

*Married woman—Separate trader.*

The plaintiff, a married woman, professed to be carrying on business separate from her husband, but the latter got his means of subsistence out of the profits of the business, took ready money as he pleased, was actively engaged in the management of the business, in buying and selling goods, conducting correspondence, keeping books, etc., and in the transaction in which the debt to the defendant was incurred appeared as principal, though husband and wife swore that he was in all things but the wife's agent. The goods in the shop having been seized under the defendant's execution and claimed by the plaintiff; the jury in an interpleader issue found for the plaintiff, but the Court set aside the verdict and directed judgment to be entered for the defendant.

*Osler*, Q.C., for the claimant.

*Cassels*, C.C., and *Stonehouse*, for the execution creditor.

Div'l. Ct.]

[June 14.]

#### IN RE WINSTANLEY & CARRICK.

*Vendors and purchasers' Act—Will, construction of—Devise in fee simple—Partial restraint on alienation.*

After devising certain land to one of his daughters, the testator proceeded: "the remaining lot . . . I bequeath to my daughter, E. R., and that she shall not dispose of the same only by will and testament, and if either of my daughters shall depart this life without leaving issue, then and in such case the survivor shall be possessed of the share of the deceased sister."

*Held*, on appeal from the judgment of *PROUDFOOT*, J., that E. R. took an estate in fee simple with an executory devise over, but that the restriction upon alienation, being partial, was valid.

*J. H. McDonald*, for vendor.

*W. N. Miller*, for purchaser.

Div'l. Ct.]

[June 19.]

#### BANK OF TORONTO V. HALL.

*Execution—Partnership and separate creditors—Priority of writs.*

L. having a judgment against a firm of R. & Co., which was in insolvent circumstances, issued execution and directed the sheriff to levy the amount on the separate goods of R., a member of the firm. The plaintiffs had a subsequent execution in the sheriff's hands, issued upon a judgment against R. individually, and the sheriff was directed on this writ to levy the amount on the goods of R. The sheriff sold R.'s goods and applied the proceeds first upon L.'s execution, after verbal notice from the plaintiff that they claimed the proceeds of R.'s separate property as applicable first to their writ. The plaintiffs then brought this action against the sheriff for a false return.

*Held* (*PROUDFOOT*, J., dissenting), reversing the judgment of *PROUDFOOT*, J., that L. had priority over the plaintiffs' writ on the separate goods of the debtor.

*Per* *PROUDFOOT*, J., the equitable principle of administering an insolvent estate between separate and partnership creditors should be applied, and priority given to the plaintiffs on the separate property of the debtor.

*Robinson*, Q.C., for plaintiff.

*G. T. Blackstock*, for defendant.

Div'l. Ct.]

[June 19.]

#### IN RE CORNISH.

*Mechanic's Lien—Two successive contractors—Liens of creditors of first contractor—Computation of ten per cent.*

A contractor having performed a certain amount of work on a building, failed to complete it, whereupon his surety entered into an agreement with the owner to complete it. Creditors of the original contractor now claimed liens for material furnished.

*Held*, that the ten per cent. of the contract price

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which the owner was bound to retain to meet such liens should be computed upon the price payable to the original contractor for the work done by him.

*Snelling*, and *G. H. Ritchie*, for the lien holders.

*A. Cassels*, for the owner.

Ferguson, J.]

[May 14.]

## GARDINER V. CHAPMAN.

*Riparian proprietor—Canal—Polluting waters—Injunction—Rideau Canal—Rights of Riparian proprietors.*

*Held*, that the plaintiff was entitled to an injunction restraining the defendant from constructing certain works which would interfere with the plaintiff's rights as a riparian proprietor on the banks of the Rideau Canal.

There was a continuous sheet of water from the plaintiff's land to the track of vessels navigating the canal, of sufficient depth to be navigable for boats of considerable size. This sheet of water was not part of the canal proper, though a portion of the river through the bottom of which the canal was constructed.

*Held*, that the plaintiff had the same rights in respect of this sheet of water as he had in respect of the canal under the Act 8 Geo. IV., cap. 1, sec. 157, which enacts that it shall be lawful for owners and occupiers of lands adjoining the canal to use any boats thereon for the purpose of husbandry, etc.

*Walkem*, Q.C., and *J. B. Walkem*, for plaintiff.

*Britton*, Q.C., and *McIntyre*, Q.C., for defendant.

Ferguson, J.]

[June 11.]

## HILL V. HILL.

*Administration—Accounts—Costs of establishing second will—Allowance to executor of first will—Tenant for life—Repairs—Costs.*

The defendant being executrix under a first will paid out of the estate the costs of an action brought to test the validity of this will as against a subsequent will which resulted in the second will being established. The evidence at the trial showed that for many years the testator had been mentally and physically weak, and many witnesses thought that he was incapable of making a will at the time the

second was made. Under an order of reference to take the accounts of the defendants as executrix under the first will the Master allowed to the defendant in her accounts the amount of costs paid.

*Held*, on appeal that the Master rightly allowed them.

The defendant was tenant for life under the will, and the testator further devised to her the income of all investments of which the testator died possessed for her own use and also the principal of such investments as she might require to use for her own benefit. She repaired the buildings on the land of which she was tenant for life out of the investments bequeathed to her, and the Master allowed her this sum in her account.

*Held*, that the amount was properly allowed.

The defendant took out probate under the first will and acted as executrix thereunder until the second will was established. The judgment in this case directed a reference to ascertain the amount with which she was chargeable, and an account of her dealings with the estate.

*Held*, that the costs of all parties, including the defendant, should be paid out of the estate.

*Plumb*, for the plaintiff.

*Howell*, for the defendant.

Ferguson, J.]

[June 12.]

## CLARKE V. THE UNION FIRE INSURANCE CO.

*Insurance—Lex loci contractus—Agency.*

The defendants signed and sealed policies in blank and sent them to an agent in New York who, on effecting an insurance, filled up and delivered them. The policy in this case was delivered August 8th, 1880; the fire occurred August 10th, and the premium was paid by cheque August 11th, which cheque was accepted by the New York agent and forwarded to Toronto, the Co.'s head office, but was returned by the Co. and refused.

On an attempt to prove a claim under the policy in the Master's Office it was contended that the filling up and the issuing of the policy in New York (and the acceptance by the agent there of the premium—which was a cheque payable to the order of the Co.—brought the contract within the laws of the State of New York), would bind the Co., but the Master held (19 Can. L. J. 363) that the contract was made in Toronto, where the policy was signed and sealed; and on an appeal from the Master it was

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*Held*, that the Master was right. That the contract was governed by the law of Ontario. That the law defining the business engagements is that of the place where the corporation has its seat. That the agent in New York had no authority to bind the Co. by any contract not in accordance with the policy sued on, and that he had no power to settle any disputed matters, as they had to be referred to the principal whose place of business was in Ontario.

*Falconbridge*, for the claimants.

*Foster*, for the plaintiff.

*Bain, Q.C.*, and *A. C. Galt*, for the defendants.

Boyd, C.]

[June 19.]

## MARTIN v. EVANS.

*Judgment—Action on to set aside invalid assignment—Technical defect in judgment—Partnership and separate creditor—Costs.*

In an action on a County Court judgment to set aside an assignment for the benefit of creditors as invalid, it is no defence that the County Court judgment was signed in pursuance of an order under Rule 324, which was made in chambers instead of in court, the time for moving against it in the County Court having elapsed.

An assignment by a partner of his separate estate which placed his partnership creditors on an equality with his individual creditors was held bad.

*Wilson and Bell*, for plaintiff.

*Atkinson and Christie*, for defendant.

Proudfoot, J.]

[June 25.]

## BALL v. THE CROMPTON CORSET CO.

*Patent of invention—Invention—Infringement—Patentable article—Mechanical equivalent.*

F. was the patentee of an article, and in an action for alleged infringement of the patent the defendants set up that S. was the inventor. It appeared that F. and S. applied for a joint patent in the U. S. A., both alleging that the article was F.'s invention. Being told that a joint patent could not be granted, the invention was patented in F.'s name alone. S. afterwards interfered and evidence was taken, but S. finally abandoned his claim, as he said for want of means to prosecute it.

*Held*, on this evidence that the defence that S. was the inventor was not made out. The plaintiff's

patent was for an article known as "Florsheim's Gore," part of the description of which was "in an elastic gore, gusset, or section, . . . the springs arranged in groups and made of a continuous length of coiled wire." The defendants manufactured a similar gore, the only variation being that, instead of continuing the coiled spring from group to group of the spring, they severed the wire and connected the groups of springs with a cord.

*Held*, merely an attempt to evade the patent, and that it was an infringement.

A patent was granted in England in 1866 to M. for improvements in the manufacture of elastic gussets, which, instead of weaving India rubber springs into the fabric, the India rubber springs were secured between two pieces of material by stitching in parallel lines along each side of the rubber spring, and instead of inserting the rubber springs in separate pieces, the rubber after traversing the fabric was turned round and caused to return parallel to its first course and secured by stitching the fabric alongside of it as before, thus making a continuous spring. A process of puckering the fabric in stitching it was also described in the patent, and a mode of making a margin of inelastic material. The plaintiff's patent substituted a coiled wire spring for India rubber and inclosed it in a tube and arranged the tubes in groups; the springs did not extend to the margin, but were stayed at their ends by inelastic material, and the spring was continuous.

*Held*, that the coiled wire was only a mechanical equivalent for the India rubber spring, and that it did not possess any element of invention.

*Held*, also, that the arrangement of the tubes in groups was not new, nor was it a patentable invention.

*Cassels, Q.C.*, and *Akers*, for plaintiff.

*MacLennan, Q.C.*, *Osler, Q.C.*, and *Biggar*, for defendants.

Osler, J.A., and Ferguson, J.]

[June 30.]

## CANADA ATLANTIC RAILWAY CO. v. THE CITY OF OTTAWA.

*Railway Bonus.*

Judgment was given in this, sustaining the judgment of Proudfoot, J.

*Gormally*, for plaintiffs.

*MacLennan, Q.C.*, and *McTavish*, for defendants.

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Ferguson, J.]

[June 30.]

**HILL V. MACAULAY.***Assessment and taxes—Invalid assessment—Tax sale.*

Where the plaintiff's land was assessed as one with that of another proprietor adjoining it for several years, and was finally sold for the arrears of taxes so charged.

*Held*, that the assessment was bad and the sale void.

*Held*, also, that the case did not come within R. S. O. cap. 180, sec. 118, which provides that the treasurer may, on receiving satisfactory proof, that any parcel of land on which taxes are due has been subdivided, he may receive the proportionate amount of tax chargeable upon any of the subdivisions and leave the other subdivision chargeable with the remainder, and that he may divide any parcel returned as in arrear into as many parts as the necessities of the case may require.

*Dougall, Q.C.*, and *Holton*, for the plaintiff.

*Cassels, Q.C.*, and *Clute*, for the defendant.

**COMMON PLEAS DIVISION.****McKAY V. CUMMINGS.***Malicious arrest—General issue by statute—Necessity of pleading—Evidence.*

In an action for malicious arrest it appeared that the plaintiff, a guest at an hotel in St. Catharines, on awakening in the morning at about six o'clock, discovered that he had been robbed of his gold watch and chain and about \$50 in money. He sent for the chief of police, and on his arrival met him on the street outside the hotel, informed him of his loss, and requested him to search the house, which the defendant refused to do without a search warrant. An altercation then took place which ended in defendant calling plaintiff an impositor, and arresting him and taking him to the police station, when, after being detained for a few minutes, he was discharged. The defendant attempted to justify his action by stating that he arrested plaintiff for breach of one of the city's by-laws in swearing on the street, but the evidence failed to establish that this was the cause. The jury found a general verdict for the plaintiff with \$200 damages. They also specially found in answer to a ques-

tion to that effect put to them, "that the defendant honestly believed that his duty as constable called upon him to make the arrest." The learned judge thereupon entered a nonsuit holding that defendant should have received notice of action. The general issue by statute, R. S. O. ch. 73, was not pleaded, and the statement of defence was not framed so as to enable defendant to avail himself of it, and there was no evidence on which the special finding of the jury could be supported.

Under these circumstances the nonsuit was set aside and judgment entered for the plaintiff with the \$200, the damages assessed.

*Osler, Q.C.*, for the plaintiff.

*J. K. Kerr, Q.C.*, for the defendant.

**SUTHERLAND V. COX, ET AL.***Brokers—Agreement to carry stock on margin—Failure to purchase stock—Right to recover margin—Custom.*

The defendants assumed a contract made by the plaintiff with one F., a broker, under which F. was to carry 500 shares of Federal Bank stock on margin for the plaintiff for a definite time. The defendants received from F. \$3,440, margin paid to him by plaintiff, but it appeared that defendants never had and did not carry any stock for the plaintiff, but was, as it is termed, "short" on this particular stock.

*Held*, that the plaintiff was entitled to recover from the defendants the amount so paid over to them as margin.

The custom of brokers commented on.

*D. E. Thomson and Henderson*, for the plaintiff.

*J. K. Kerr, Q.C.*, and *Lash, Q.C.*, for the defendants.

**McKERSEE V. McLEAN.***Seduction—Service—Right to maintain action.*

In an action of seduction it appeared that the girl seduced was the grandniece of the plaintiff. On her father and mother's death, which occurred when she was about twelve years old, she went to live with the plaintiff, and from thence went out to service to various persons, and at the time of the seduction and for three years previously was in service with one C., retaining the wages she earned for her own use. While in C.'s service she was seduced

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by defendant in the month of April, she being at that time about nineteen years old. In June following she went to Detroit for a couple of weeks, and from thence to the plaintiff's, where she resided until she was sick, when she went to the hospital, where she was confined. While at the plaintiff's she worked and did whatever was required of her; the plaintiff treated her as if she was at home, as her guardian.

*Held*, that the plaintiff could not recover, for that the right of action for the alleged wrong was not vested in the plaintiff but in the person, who was master of the girl at the time of her seduction.

*Ashton Fletcher*, for the plaintiff.

*J. K. Kerr*, Q.C., for the defendant.

#### RICHARDSON V. JUNKIN.

*Trespass—Title to land—Pleading—O. J. Act, Rules 128, 148—Costs.*

By Rule 148 every material averment alleged in the former pleading is not to be taken as expressly claimed, unless expressly admitted by the pleading of the opposite party, but that the silence as to any allegation—which, read with Rule 128, means every material allegation—is not to be sustained into an implied admission. When, therefore, silence is not maintained, but an answer is given which is insensible, if it is not to be read as admitting certain statements in the former pleading, such statements must be taken as admitted.

A statement of claim alleged that defendant entered into possession of the plaintiff's premises under a verbal lease for a year: that he left before the expiration of his term, and wrongfully removed, and took away and converted to his own use, certain fixtures which had been put in by the defendant under an agreement with plaintiff whereby plaintiff remitted three months rent; and alleging by such removal and conversion injury to the premises and loss to the plaintiff. The statement of defence alleged that in order to render said premises fit for the purpose required, namely, a shop, it was necessary to refit the premises by putting in the fixtures in question, it being agreed that on defendant leaving he should be allowed to remove said fixtures. At the trial the jury found for the plaintiff with \$50 dam-

ages, and the learned judge refused to certify to entitle the plaintiff to full costs. The taxing officer ruled that without a certificate the plaintiff was only entitled to tax Division Court costs, with a right to the defendant to set off full costs and he taxed the costs accordingly. The plaintiff appealed to Galt, J. in chambers, who affirmed the taxing officer's ruling.

*Held*, on appeal to the Divisional Court, affirming the judgment of Galt, J., that the effect of the statement of defence was to admit the agreement and the entry thereunder, and the only question in issue was the right to remove the fixtures, and, therefore, the title to land did not come in question, and plaintiff, without a certificate, was not entitled to tax full costs.

It was urged that because the defendant failed in his defence he was not entitled to costs of and subsequent to his statement of defence.

*Held*, that this might have been urged before the judge at the trial for the exercise of his discretion, but was not a ground for appeal.

*George Bell*, for the plaintiff.

*Aylesworth*, contra.

#### HEPBURN V. PARK.

*Chattel mortgage—Preference—Consideration—Statement of.*

In the case of a mortgage of goods, in order to create a fraudulent preference, not only must there exist a fraudulent intent in the mind of the mortgagor, but also in that of the mortgagee.

In this case it was objected that there was such fraudulent intent. The learned judge at the trial found, and the Divisional Court sustained his finding, that there was no such intent on the part of the mortgagee. The Court was also of opinion that the evidence would warrant the conclusion that no such intent existed on the mind of the mortgagor. The mortgage was, therefore, held good.

Part of the consideration of the mortgage was covered by a note, which was discounted by the mortgagee at a bank. The mortgagee being a merchant and having received the note in course of business from his customer.

*Held*, that from the mere fact of the note being discounted at the bank, the Court could

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not assume that the debt represented by the note must be deemed to be paid, and the remedy on the note to be alone looked to; and therefore the amount of the indebtedness on the mortgage could not be said to be untruly stated.

*MacKelcan*, Q.C., for the plaintiff.

*Walker* (of Hamilton), for the defendant.

#### REG EX REL. STEWART V. STANDISH.

*Public schools—Trustee—Contract—Vacating seat.*

When a school trustee, who was a medical practitioner, acted on his professional capacity under engagement by the Board in examining the pupils attending the school as to the prevalence of an infectious disease, and made a charge of \$15 therefor, which the Board ordered to be paid.

*Held*, that this disqualified him as such trustee, and rendered his seat vacant.

A rule for leave to exhibit an information in the nature of a *quo warranto* to test defendant's right to retain his seat was decided to be made absolute without costs, unless within ten days the defendant should admit he had forfeited his seat, and consent to the board declaring it vacant, in which case the rule was to be discharged without costs.

*Alister Clark*, for the applicant.

*Caswell*, for the respondent.

#### WALTON V. SIMPSON.

*Contract—Fraud—Waiver—Finding of jury.*

A contract induced by fraud is not void, but voidable, merely at the option of the party affected or prejudiced thereby; and when the party affected adopts the contract induced by fraud, the discovery of a new incident of the fraud does not revive the right to repudiate.

In this case, there being no finding by the jury that the defendant had knowledge of and had waived the fraud, a new trial was directed.

*Bethune*, Q.C., for the plaintiff.

*Akers*, contra.

#### TUCKETT V. EATON.

*Seizure after payment of debt—Malice—Damages excessive.*

After the amount of a judgment recovered in a Division Court had been paid, the plaintiff's

goods were seized by the Division Court bailiff under an execution issued thereon. In an action for such seizure the jury found for the plaintiff with \$1,500 damages.

*Held*, under the circumstances set out in the case, the damages were clearly excessive.

*Held*, also, that the action would not lie without proof of malice, and that no malice was shown.

*Osler*, Q.C., for the plaintiff.

*Shepley*, for the defendant.

#### LANDREVILLE V. GOUIN.

*Accident—Snow and ice falling from roof of house—Liability—Notice.*

In an action for damages sustained by the plaintiff, who was walking along the street, by reason of snow and ice falling from the roof of the defendant's house and injuring him, it appeared that about half an hour before the accident happened the defendant was notified of the dangerous character of the roof, but took no precautions to prevent an accident.

*Held*, Rose, J., dissenting, that the defendant was liable.

*Hector Cameron*, Q.C., and *Frank Macdougall*, for the plaintiff.

*McCarthy*, Q.C., for the defendant.

#### MCCLURE V. KREUTZGER.

*Sale of goods—Acceptance—Quantum meruit.*

The defendant purchased from the plaintiff a carload of "No. 1 green hoops," to be delivered at the railway station. On the arrival at the station they were removed by the defendant to his own place, and some of the hoops were used by him. He then wrote to the plaintiff that he was astonished at his sending such dry and rotten hoops for first-class green hoops and if he had seen them before they were at his place, he would not have touched them; that there were only 7,300 in the car instead of 7,400, as stated by plaintiff; that he enclosed a bill which was the amount he intended to pay, and not a cent more, because they were not worth that; and if plaintiff would accept the amount offered, to let defendant know by return mail and he would remit. In answer to this the plaintiff, through a solicitor, threatened

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suit, when defendant replied that if plaintiff would not accept this he must go on and sue.

*Held*, that there was evidence to go to the jury of an acceptance of the hoops and agreement to pay on a *quantum meruit*.

*Bethune, Q.C.*, for the plaintiff.

*Clement* (of Berlin), for the defendant.

#### COMMERCIAL NATIONAL BANK OF CHICAGO V. CORCORAN.

*Foreign corporation—Right to hold goods—Transfer of—Warehouse receipts—Bills of Sale Act—Banking Act.*

Interpleader issue to try the title to goods.

C. & Co., carrying on business in Chicago, in the State of Illinois, for the manufacture of mill machinery, had certain machinery manufactured for them in Stratford, Ont., by the T. & W. manufacturing company, which was warehoused with M. & T. at Woodstock, Ont. C. & Co. being pressed by the plaintiffs, their bankers in Chicago for collateral security for two of their notes of \$5,000 each, discounted by the bank, endorsed over to the bank the warehouse receipts for these goods. At the maturity of the notes, C. & Co. not being in a position to retire them, in pursuance of an arrangement made to that effect, the warehouse receipts were cancelled and new ones, dated 12th October, 1883, made out direct to the plaintiffs. On 3rd September, 1883, C. & Co. had made an assignment to a trustee for the benefit of their creditors. On 22nd November the defendants placed a writ of execution in the sheriff's hands against C. & Co., under which these goods were seized. It was expressly found that there was no fraudulent preference or intent.

*Held*, that the plaintiffs, a foreign corporation, could hold personal property in Ontario; that, C. & Co. being resident in the State of Illinois, the transfer of the property must be governed by the law of that State, according to which it was ruled, subject to whatever rights the trustee for creditors had, that the effect of the warehouse receipts to the plaintiffs was to transfer the property and possession in the hands of the plaintiffs subject to the trustee's rights, and, therefore, there being a change of possession, the Bills of Sale and Chattel Mortgage Act did not apply.

*Held*, also, that the Banking Act did not apply.

The goods were, therefore, held to be the plaintiffs as against the defendants.

*J. K. Kerr, Q.C.*, for the plaintiffs.

*Idington, Q.C.*, for the defendants.

#### LAW V. CORPORATION OF NIAGARA FALLS.

*Municipal corporation—Drainage—Liability for overflow.*

Many years before defendants' municipality was laid out, a culvert was constituted by one F., for a railway company on their lands, which adjoined the creek in question. By reason of the culvert the water brought down by the creek was not carried off, but overflowed on to the plaintiff's land. The creek was the natural drain for the surrounding country, but defendants used it to a small extent for the drainage of the town. It was expressly found that the flooding would not have been occasioned by the water brought down through the defendants' uses of the creek; but that the water brought down from the area drained apart from defendants' uses would have alone caused the damage.

*Held*, that the defendants were not liable for the damage sustained.

*J. K. Kerr, Q.C.*, for the plaintiff.

*Osler, Q.C.*, for the defendants.

#### CAIN V. JUNKIN.

*Crown grant—Error—Evidence—Possession.*

In 1851 J. purchased the whole of lot 20 from the Crown, the lot nominally containing 200 acres, and described in the Crown Lands books as containing 175 acres, more or less. On 30th October, 1852, before taking out his patent he sold and assigned by a written assignment to R. the east half or part of the lot described as "seventy-five acres, neither more nor less." In 1863 R. sold to B. his interest in the parcel described as containing seventy-five acres, more or less, and as being composed of the east part of the lot. On 22nd July, 1883, B. took out a patent for his portion, the land being described as seventy-five acres, more or less, being all the lot except the west 100 acres. On 28th August, 1868, J., who retained all he had not sold to R., took out a patent himself, the land being described as the west 100 acres.

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without the words more or less, these words having been erased from the printed form on which the patent was written. Subsequently B. reconveyed to R., through whom the plaintiff claimed by mesne conveyances, the plaintiff claiming as one of the heirs of his father, and as having acquired the title of the other heirs. J., after obtaining his patent, conveyed the northerly and southerly portions respectively of the 100 acres to his two sons, James and William, respectively. About the time J. took out his patent, by instruction from the plaintiff's father, a surveyor ran a line dividing the seventy-five acres from the one hundred acres; and in 1874. produced another line over that run under instructions to lay off the seventy-five acres, which he did, and plaintiff's father and the defendant jointly erected a fence on such line. The actual acreage it appeared exceeded 175 acres by some eleven acres, the surplus coming within the portion patented to B. The actual occupation under B.'s patent was confined to the seventy-five acres.

*Held*, that under the circumstances it could not be held that the patent to B. was issued in error, so as to enable the defendants to claim the surplus of eleven acres.

*Held*, also, that defendants failed to show any possessory title to such surplus except as to a small portion thereof.

*Pousette*, for the plaintiff.

*Hudspeth*, Q.C., and *G. H. Watson*, for the defendants.

#### WHEELER ET AL. V. WILSON.

*Company—Stock, cancellation of—Fraud—Laches.*

The defendant was an original shareholder in a joint stock company, and as holder thereof was elected a director. Before being elected, a statement, prepared by the company's secretary was published by them, setting forth that the company was in a flourishing condition and earning a ten per cent. dividend. On the faith of such statement defendant subscribed for new shares in the company. Soon afterwards the defendant suspected that the statement was incorrect and threatened legal proceedings to compel the company to cancel the stock, whereupon a resolution was passed directing the books to be examined, and on such examination the statement was found to be false

and misleading, and the company practically insolvent. A meeting of the shareholders was then called and a by-law passed cancelling the stock. After the defendant's subscription for the new stock, and before the cancellation, as also before the defendant became aware of the falsity of the statement, the plaintiff became a creditor of the company. The plaintiff obtained a judgment against the company, and sued defendant for the amount of the new stock unpaid by him.

*Held*, that the plaintiff could not recover; that there was power to cancel the stock; that the cancellation was duly made; and that the defendant was not guilty of any laches.

*Allan Cassels*, for the plaintiff.

*J. K. Kerr*, Q.C., for the defendant.

Burton, J.A.]

#### MOFFAT V. SCRATCH.

*Crown grant—Surrender—Evidence of.*

Certain land was granted by the Crown to one W., but subsequently in consequence of an alleged surrender of the land to the Crown, a new grant was made to the defendant's vendor, after the form of W.'s patent, and before the alleged surrender the land was sold for taxes. The only evidence of the alleged surrender was an endorsement on the back of the new patent, which stated that the land was surrendered by one M., the attorney mentioned the annexed power, but no power of attorney was produced, and the surrender was signed by M. as principal, and not as attorney for any named principal.

*Held*, in ejectment, that under the circumstances, the plaintiff claiming under the tax title was entitled to recover the land as against the defendant claiming under the new patent.

*J. H. Ferguson*, for plaintiff.

*T. M. Morton*, for defendant.

Osler, J.A.]

#### CAMERON V. CANADA FIRE AND MARINE INSURANCE COMPANY.

*Insurance—Proofs of loss—Delivery as soon as possible after fire—Actual cash order of property—Property outside of Ontario—R. S. O. ch. 162.*

The Fire Insurance Policy Act, R. S. O. ch. 162, does not apply to property outside of Ontario.

Action on a policy of insurance against fire and

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packing, etc. By one of the conditions of the policy, it was provided that the proofs of loss should be delivered as soon after the fire as possible. The fire occurred on the 17th September, 1881, and the proofs of loss were not delivered until the middle of May, 1882, when they were objected to and returned to the insured who re-delivered them in the same condition in the month of July following. The only reason given for not delivering them sooner, was that it was not convenient to do so.

*Held*, that the condition was not complied with.

Another condition required that the proofs of the loss or damage was to be estimated according to the actual value of the property, *i.e.*, what it could have been actually sold for in cash at the time of loss, and the affidavit should state the actual cash value of the property. In the printed form of proofs of loss, which were used, the words actual cash value were struck out and a statement substituted giving the cost of replacing the whole property destroyed, and the cost of the property at the time it was put into the ice-house being in 1880, a year previous to the insurance being effected.

*Held*, this was not a compliance with the conditions.

Under these circumstances there would be no recovery on the policy.

Rose, J.]

#### RE MILLOY AND CORPORATION OF ONONDAGA.

*By-law—Animals running at large—Unreasonableness—Mode of enforcing penalties—Indians and Indian Lands—Motion to quash amending by-law after year from passing of original by-law.*

By by-law No. 84, passed by the Township of Onondaga, on the 29th May, 1882, certain animals therein named, were prohibited from running at large. Clause 5 provided that *except between the 10th May, and the 1st December in any year*, it should not be lawful for the owners of any other animals not thereinbefore mentioned or indicated to allow or permit the same to run at large. Clause 6 imposed a fine or penalty not exceeding \$5 for every offence, but the imposition of any such fine was not to relieve the animals from the operation of any by-law relating to pounds or poundkeepers, or for any trespass or damages committed or done by them, by reason of their being so permitted to

run at large. Clause 7 provided for the recovery of fines or penalties (not adding the words "and costs") under sec. 421 *et seq.* of the Summary Convictions Act, and in the event of no distress for imprisonment, etc., unless such fine or penalty and costs, including costs of committal, be sooner paid. By by-law No. 97, passed on 9th July, 1883, after reciting that the object was to prevent all animals of any age or description running at large at all seasons of the year, amended by-law 84 by striking out from Clause 5 the words in italics. A motion to quash By-law 97, was made after a year from the passing of By-law 84, but within the year after the passing of By-law 97.

*Held*, that the by-law was not oppressive and unreasonable as extending to all animals and all seasons of the year, inasmuch as the by-law was no wider than the statute under which it was passed.

An objection that the provision of the by-law as to levying fines, was *ultra vires* in that sec. 492, subsec. 2, provided a mode of recovery, *i.e.*, by sale of the animals impounded, and hence that secs. 421 *et seq.* did not apply; but held that the objection was taken under a misconception of facts in that the by-law was not nor did it profess to be a pound by-law; and it was by no means clear that these sections would not apply to a pound by-law.

*Quare* as to the effect of the omission of the errors "and costs" in the clause providing for the penalty, but as these were not taken in the rule, it was not considered.

A further objection was that the by-law should have been limited in its provisions so as not to extend to the Indian lands within the township; but the learned judge refused to quash on this ground (1) because the quashing a by-law is not imperative but discretionary; (2) and if it were quashed the original by-law would remain. (3) It would only be quashed, as to the Indians and Indian lands. (4) The applicant is not prejudiced and this is not a substantial objection. (5) and the Indians who are alone affected are not complaining.

The cases in which an amending by-law may be moved against, after the expiry of a year from the passing of the original by-law considered.

*V. Mackenzie*, Q.C., for the applicant.

*Wilson*, Q.C., contra.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

EASTER TERM, 47 VICT., 1884.

During this term the following gentlemen were entered on the books of the Society as Students-at-Law:—

Graduates—C. I. T. Gould, S. C. Warner, W. T. Kerr, Ernest Heaton, F. M. Field, John A. Davidson, H. H. Langton.

Matriculants—A. A. McMurchy, J. F. Edgar, A. L. Baird, J. A. Macdonald.

Juniors—A. McDonell, J. G. Gauld, C. D. Scott, H. Scott, H. F. Errett, J. G. Kerr, T. Graham, W. J. McKay, H. Millar, W. B. Scane, D. T. K. McEwan, C. Pierson, E. M. Lake, R. M. Thompson.

The following gentlemen were called to the bar, namely:—

David K. I. McKinnon, honor man and gold medalist; Alexander Mills, honor man and bronze medalist; Alexander W. Ambrose, Alfred Craddock, Edmund Sweet, William J. Code, William A. Dowler, Andrew C. Muir, Edwin R. Reynolds, Thomas B. Shoebbotham, Charles H. Cline, James W. Hanna, Robert N. Ball, Gerald Bolster, Robert Christie, William Cook, Robert A. Pringle, Jos. Walker, Arthur W. Morphy, John W. Russell.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

1884. Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
1885. Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.  
1885. Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnehose, Lazare Hoche.

## OR NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

**F E E S .**

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees.....	40 00
Solicitor's Examination Fee.....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions.....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission.....	1 00
Fee for other Certificates.....	1 00

*Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.*

# Canada Law Journal.

VOL. XX.

SEPTEMBER 16, 1884.

No. 16.

## DIARY FOR SEPTEMBER.

17. Wed ..... First U. C. Parliament met at Niagara, 1792.  
 19. Fri ..... President Garfield died, 1881.  
 20. Sat ..... Lord Sydenham, Governor-General, died, 1841.  
 21. Sun ..... 15th Sunday after Trinity.  
 24. Wed ..... Guy Carleton, Lieut.-Governor, 1766.  
 25. Sun ..... 16th Sunday after Trinity.  
 30. Tues ..... Sir Isaac Brock, President, 1811.

TORONTO, SEPTEMBER 16, 1884.

THE *Canada Gazette* of the 13th inst. announces that Hon. John O'Connor, Q.C., has been appointed a Judge of the Supreme Court of Judicature for Ontario, a Justice of the High Court of Justice for Ontario, and a member of the Queen's Bench Division, *vice* Hon. M. C. Cameron, appointed Chief Justice of the Common Pleas Division.

THE opinion expressed in our issue of 1st July last as to the proper construction of 41 Vict. chap. 17, sec. 2, appears to coincide with the recent decision of the Court of Appeal in *Goddard v. Coulson* noted *ante* p. 263. The latter decision is opposed to that of the Chancery Division in *Re Cornish* noted *ante* p. 266.

THERE have been singularly few cases of general interest argued before the Chancery Divisional Court at the present session. The motion to strike out *Langtry v. Dumoulin* is almost the only matter that has brought up an interesting legal argument. The other cases for the most part have involved mainly findings of fact on the evidence.

WE have been requested to publish the judgments in *Badenach v. Slater*, on the subject of fraudulent preferences, a note

of which will be found on a previous page of this journal (p. 259 *ante*). The judgment of the Chief Justice we have been unable to procure as yet, but we are informed that in all material points it is the same as the views expressed by Strong and Gwynne, J.J., in their judgments which will be found in another column.

The following is a summary of the cases in appeal which stood for hearing at the sitting of the Court of Appeal, commencing 2nd September, 1884:—

Queen's Bench Division.....	21
Cameron, J. ....	1
	— 22
Common Pleas Division.....	15
Galt, J. ....	1
Osler, J. ....	1
	— 17
Chancery Division .....	2
Boyd, C. ....	6
Proudfoot, J. ....	6
Ferguson, J. ....	6
	— 20
Election Cases.....	3
Patterson, J. A. ....	1
County Court .....	25
	— 88

WE have received and have before us an annotated edition of the Naturalization Act, Canada, 1881, with a preface, by Mr. Howell the well-known author of the *Surrogate Courts Practice*. This Act only came into force on July 4th, 1883, so that the work is very opportune. A hasty glance over it is all that we have at present been able to give, but we shall probably again refer to it. The typographical part of the book is excellent, and the notes appear to shew careful research. We will not, however, at present say more than that these annotated editions of particular

## FRAUDULENT CONVEYANCE—RECTORY CASE.

Acts appear to us to be a very useful form of legal literature, and each one that is produced should be cordially welcomed.

It has always been a surprise to us that the provisions for summary inquiries into fraudulent conveyances, in R. S. O. cap. 49, secs. 10, *et seq.*, should be confined, as they are, to conveyances of land. The class of persons who make conveyances with a view to defrauding and delaying their creditors do not always possess lands, but most of them possess chattels of greater or less value. At all events nothing is commoner than for impecunious people with fraudulent tendencies to execute chattel mortgages to their sisters, their cousins, or their aunts, and leave their creditors out in the cold. At present we take it, these chattel mortgages, however insupportable, can only be upset by means of a Superior Court action, or an interpleader issue. It would certainly be very convenient if in such cases summary applications could be made to the Master in Chambers, or the County Court Judge, as in the case of conveyance of land. We present this suggestion to the Attorney-General as a slight recognition on our part of his recent public services.

It is a somewhat remarkable fact that a *cause célèbre* on the subject of maintenance and champerty should have come up in our courts, so soon after one on the same subject in the English courts. The case of *Bradlaugh v. Newdigate* was much referred to on the argument in the motion to strike out the now famous Rectory case from the list of cases standing for rehearing before the Chancery Divisional Court, which is now awaiting decision. The whole question in dispute is whether the vestry and churchwardens of St. James' Cathedral have such an interest in the subject of the action of *Langtry v. Dumoulin* as justifies them from a legal

point of view in intervening, and carrying the case to rehearing in Canon Dumoulin's name. It appeared abundantly clear in the evidence that Canon Dumoulin, if left to himself, would not proceed further with the litigation, but that, subordinating his judgment to the wishes of the congregation he unwillingly acquiesced in the latter assuming control over the case and continuing the fight, at their own expense. Counsel for the plaintiffs, indeed, in somewhat forcible language, talked of "ecclesiastical parasites" who sought to derive sustenance by fattening on the rector. Counsel for the defendants on the other hand contended that the congregation had such an interest as prevented their intervention in the suit being classed as maintenance or champerty, because a wealthy rector would be a relief to the pockets of the congregation, and because the church debenture holders would be more secure in their investment. They also contended that Canon Dumoulin, if he succeeded in establishing his right to the fund in dispute, would hold it as a trustee for the congregation. This the plaintiffs strenuously denied, quoting words of Canon Dumoulin to show that such was not a position he himself recognised, inasmuch as he claims the money would be at his own disposal, although he would consider himself morally bound to consult the congregation in the disposal of it. They, also, lay stress on the fact that no such relationship of trustee and *cestui que trust* is set up in the pleading. Counsel for the defendant urged that as a master may maintain a servant's suit, and a rich man a poor man's, so *a fortiori* the vestry and churchwardens may maintain their rector's. On this the Chancellor observed that in the ordinary case of the rich man and the poor man, the poor man was desirous of having his suit maintained, whereas here the poor man appeared to wish nothing of the kind. Perhaps the decision will ulti-

## CANADIAN QUEEN'S COUNSEL BEFORE THE PRIVY COUNCIL.

mately turn upon the question of whether a *bona fide* belief that one has an interest in the subject of an action, justifies one in intervening therein.

CANADIAN QUEEN'S COUNSEL  
BEFORE THE PRIVY COUNCIL.

It has been the practice of English Queen's Counsel to lead Colonial Queen's Counsel in appeals before the Judicial Committee of the Privy Council, no matter what was the official status or seniority of the Colonial Q.C. We are glad to learn that when Mr. Thomas Hodgins, Q.C., was in England last May investigating Imperial State Papers relating to the boundaries of the Province of Ontario, he enquired of Mr. Henry Reeve, C.B., the Registrar of the Imperial Privy Council, whether there was any rule of the Judicial Committee giving precedence to English Queen's Counsel over Canadian Queen's Counsel in all cases, even where the latter was Attorney-General of Canada. Mr. Reeve replied that there was no rule, but that the practice was for English Queen's Counsel to lead in all cases, and that no exception was made even where the Canadian Queen's Counsel was a Canadian Attorney-General. The same question was submitted to Mr. Andrew R. Scoble, Q.C., a Bencher of Lincoln's Inn, who had been for many years Advocate-General of Bombay. His reply was that he could not, nor did he know of any member of the English Bar, who could, authoritatively answer the question as to the etiquette which governed precedence in the Judicial Committee of the Privy Council. But he added that "theoretically, as members of the Colonial Bars have right of audience in the Judicial Committee, their precedence is regulated by seniority, and a Canadian Q.C. of 1860 would rank before an English Q.C. of a later year. But the precedence of Col-

onial Law officers does not seem settled; and besides there is no *obligation* on the part of an English Q.C. to take a junior brief with a Colonial Q.C. as leader. Of course the English Attorney and Solicitor-General lead everybody."

The question remained unsettled until Mr. Attorney-General Mowat arrived in England to argue the question of the boundaries of Ontario and Manitoba before the Judicial Committee, when he offered the junior brief in the case to Mr. Scoble, Q.C. Before accepting the brief, Mr. Scoble enquired through Sir Arthur Hobhouse, one of the judges of the Judicial Committee, whether there was any precedents on the point in the records of the Privy Council. No precedent having been found, the matter was referred to the Attorney-General of England, Sir Henry James, M.P., whose opinion appears to concede the right of Canadian Queen's Counsel to equal privileges with their English brethren before the Judicial Committee, and is as follows:—

"It appears to me that the Privy Council is common ground to the Bars of this country and all our colonies and dependencies. I see no reason why we should not accord equal rank to Her Majesty's counsel in the Colonies when pleading in colonial causes. As the Canadian Queen's Counsel is the Attorney-General of Ontario, I think there is an additional reason why, in this particular case, you should not object to allow him to act as your leader."

In communicating this opinion the writer adds: "This is common sense, and I think commends itself to the Bar generally."

Of course there may be cases before the Privy Council, as before the courts in Canada, where it may be proper to have a junior Queen's Counsel of eminence as leader to a senior Queen's Counsel. Such an arrangement is always possible where it is considered advantageous to the management of the case. But it is satisfactory

## RECENT ENGLISH DECISIONS.

to know that hereafter English and Colonial Queen's Counsel will take rank in Colonial appeals before the Privy Council according to seniority, and that the claim of an English Queen's Counsel to lead his senior from one of the Colonies can no longer be maintained in practice but may be conceded for the benefit of the client. One of our city contemporaries referring to this matter says:

"This action upon the part of the legal lights of the Mother Country will, perhaps, be none the less grateful to their brethren here, from the fact that it has not been taken without due deliberation and considerable warm discussion. And yet it will doubtless be a surprise to a good many people that what is so manifestly in accordance with the fitness of things should have occasioned any controversy, and especially that it should have been carried on with keenness and warmth. It is satisfactory, however, to know that, though it was not "until after a somewhat warm discussion," it was decided, "by a considerable majority, that barristers from the Colonies, when engaged professionally in the Mother Country, should henceforth be accorded a cordial and unreserved welcome." The question of the standing of Colonial counsel engaged before the Judicial Committee was left to the decision of the Attorney-General, Sir Henry James, who has ruled that they are entitled to the same recognition as English barristers of equal rank and standing."

## RECENT ENGLISH DECISIONS.

The *Law Reports* for July comprise 13 Q. B. D. p. 1-198; 9 P. D. p. 101-121; and 26 Ch. D. p. 237-433.

## COVENANT TO PAY "ALL RATES, TAXES AND ASSESSMENTS."

In the first of these the decision in *Wilkinson v. Collyer*, p. 1, may be briefly noticed. A tenant on taking a lease of a house covenanted "to pay all rates, taxes and assessments payable in respect of the premises during the tenancy, except the land tax and the landlord's property tax." The Divisional Court held in this case that a sum assessed upon the owners as their proportion of the expense of paving the street upon which the premises abutted, was not a rate, tax or assessment

within the meaning of the covenant, but a charge imposed upon the owner for the permanent improvement of his property. The principle of the decision appears to be, in the words of Manisty, J., that the words above used "apply to rates and assessments of a temporary or recurring nature, and not to a sum which is a charge upon the property giving it an increased permanent value." "No case," he adds, "has gone the length of holding that a sum assessed upon the owner as his proportion of the expense of paving a new street, is a rate, tax or assessment within such a covenant as this."

## JOINT AND SEVERAL LIABILITY—JOINT JUDGMENT AGAINST FIRM—MERGER.

In the next case, *In re J. & H. Davison, ex parte Chandler*, p. 50, the point decided was, that where a firm is adjudicated bankrupt on a judgment debt recovered against the firm jointly, if the partners are also severally liable in respect of the same matter by reason, for instance, of its arising out of breach of trust, the judgment creditor is not, by reason of his having sued for and obtained a joint judgment, thereby precluded from proving against the respective separate estates of the creditors. If he is so precluded, says Cave, J., at p. 53, "It can only be either because the separate cause of action is merged in the joint judgment, or because by suing on the joint cause of action they (the judgment creditors) have elected to rely on that only, and have thus waived the separate cause of action." But as to the first, he says, that it seems clear both on principle and authority that a joint judgment is no bar to a separate cause of action. "On principle, why should it be?" he asks. "The object of taking a joint and several note is to have the separate liability of each promisor as well as the joint liability of all, and why should the fact that the separate liability of one promisor as merged in a separate

## RECENT ENGLISH DECISIONS.

judgment against him prove a bar to an action on the joint note?" As to the second ground, he says: "The doctrine of election or waiver applies only where the person having the cause of action is put to elect between two inconsistent remedies, as in the case of the right to sue either the agent or the principal when disclosed; . . . or in the case of the right to sue for a tort or to waive the tort and sue for the proceeds in the hands of the wrongdoer. In these cases the plaintiff may elect which remedy he will have, but when he has elected one remedy he has thereby waived his right to the other. In this case, on the contrary, it is admitted that if the respondents could have proved a fraudulent misappropriation by the partners, they might have had both a joint and separate judgment, and consequently there was no election and no waiver."

## COMPANY—FORGERY OF SHARE CERTIFICATE OF OFFICER—ESTOPPEL.

The next case requiring notice is *Shaw v. The Port Philip etc. Mining Co.*, p. 103, where it was decided that a certain company were estopped by a certificate issued by their secretary, stating that the plaintiff had been registered as the owner of the shares, from disputing the plaintiff's title to the shares, although the signature of the director appended thereto was a forgery, and the seal of the Company had been affixed without the authority of the directors, it being proved that it was the duty of the secretary to procure the execution of and to issue certificates of shares in the company with all requisite and prescribed formalities. Mathew, J., at p. 108, says:—"It is stated to have been the duty of the secretary to procure the execution of the certificate with the prescribed formalities, and to issue it to the person entitled thereto. It is obviously indispensable in the ordinary course of business that the secretary should perform these duties, and

it never could have been contemplated that the purchaser of shares should himself ascertain that each of the prescribed formalities had, in fact, been complied with. It seems to me, therefore, that the secretary is held out by the company as their agent to warrant the genuineness of the certificate. It was argued by the counsel for the defendants that the fact that the certificate was a forgery prevented their being liable for the act of their agent, but he failed, as it appeared to me, to establish any difference for this purpose between a fraud carried out by means of forgery and any other fraud."

## RIGHT TO PROTECTION AGAINST FLOOD—ADJOINING LAND OWNERS.

In *Whalley v. The Lancashire and Yorkshire Railway Co.*, p. 131, we have perhaps one of the most interesting judgments, both from a legal and ethical point of view, which have appeared in the *Law Reports* for some time, in the judgment of Brett, M.R. It may be said to ring the changes on the maxim *sic utere tuo ut non lædas alienum*. The facts of the case were these: the defendants were the owners of a railway standing at the place in question upon a slight embankment, which they were authorized by Act of Parliament to make and to use as a railway embankment with a railway on it. That embankment at that place was upon sloping ground, so that on one side of it the ground was higher than on the other side. An extraordinary storm of rain arose, by which the land on the upper side was flooded; and the water, being stopped by the embankment, rested against it in a body, so that people might reasonably suppose it would endanger the safety of the embankment. Under these circumstances, the defendants cut trenches or openings through the embankment, the necessary effect of doing which was, that the water passed through these openings on to the plaintiff's land in a different way from what it would have done if it had

## RECENT ENGLISH DECISIONS.

percolated through the embankment, as it probably would have done, and by reason of its so passing through these openings in such different manner it damaged the plaintiff's land. The question was, whether the defendants were liable to the plaintiff. The jury found that from the way in which the defendants let the water through, it did more damage to the plaintiff's land than if it had been allowed to percolate through without their having done anything; but they also found that if the defendants had only to consider the preservation of their own land, what they did was a reasonable thing to do, and it was not done by them negligently. Under these circumstances, the Court of Appeal now held the defendants liable. The principal judgment was that of the M.R., who formulates the question before the Court into the following proposition: "When the water, by an extraordinary misfortune, had come to rest against the defendant's property, had they a right, in order to save their own property, to do that, the necessary effect of which was to injure their neighbour's property?" It is impossible here to follow out the different distinctions drawn in this philosophical judgment, but the way in which he sums up the result may be given in his own words: "An extraordinary misfortune happened; it fell upon the defendants, and if they had allowed things to remain as they were, they would have been the sufferers; but in order to get rid of the misfortune which had happened to them, and which, *rebus sic stantibus*, would not have injured the plaintiff, they did something which brought an injury upon the plaintiff. Under these circumstances, it seems to me the defendants are liable." "Of course there is a difference," says Lindley, L. J., at p. 140, "between protecting yourself from an injury which is not yet suffered by you, and getting rid of the consequences of an injury which has occurred to you."

## HUSBAND AND WIFE—SEPARATE ESTATE—WILL.

In *Dye v. Dye*, at p. 147, it was decided that, in order that the fee simple of an intended wife may be affected with a trust for her separate use by an agreement made between the intended husband and wife before marriage, the agreement must be in writing and signed by the wife as well as by the husband; and mere renunciation by an intended husband of his marital rights in his wife's real property is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee. But by reason of recent legislation in this Province, it does not appear necessary to dwell upon this case here.

## MEASURE OF DAMAGES—LOSS OF MARKET.

In 9 P.D., pp. 101-121, there is only one case which calls for mention, viz., *The Notting Hill*, p. 105, wherein it was decided by the Court of Appeal, affirming Sir James Hannen, that loss of market was too remote a consequence to be considered as an element of damage. Here, a ship, having been damaged by a collision with another ship, the owners of the cargo on the former claimed damages from the owners of the latter ship, *inter alia*, in respect of the loss of market in consequence of a portion of the cargo having been delayed in its arrival at the port of destination. Sir James Hannen, indeed, expressed himself as reluctantly forced to come to the above decision by reason of the weight of authority, but the Court of Appeal upheld the decision, Brett, M. R., quoting the words of Mellish, L. J., in *The Parana*, L.R. 2 P.D. 118, that loss of market, in the sense that persons are entitled to the difference between the price when the goods arrived and the price when they ought to have arrived, is on an ordinary voyage so uncertain that it cannot be the natural and reasonable consequence in every case. And therefore it is not the natural and

## RECENT ENGLISH DECISIONS.

reasonable result of a collision at sea. He also observes: "I agree that upon the question of remoteness of damages there is no difference between actions upon contract and actions not upon contract."

Proceeding now to the July number of the Chancery Division:—

## EXECUTORS AND TRUSTEES—LOSS BY INSOLVENCY OF AGENT.

The first case *In re Brier, Brierv. Evison*, p. 238, may be mentioned in connection with *Speight v. Grant*, 9 App. Cas. 1, which was noted in this journal *supra* p. 181. In *Speight v. Grant*, the point of the decision is, in the words of Lord Fitzgerald, that "Although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may in the administration of the trust fund avail himself of the agency of third parties, such as bankers, brokers and others, if he does so from a moral necessity, or in the regular course of business. If a loss of the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his has led to that result." The present case in like manner decides that when an executor employs an agent to collect money under circumstances which make such employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to show that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was. Referring to the facts in this case Lord Selborne, L.C., says:—"There were numerous small book debts to be collected; we do not know much as to the circumstances of the executors, but it would be according to the ordinary course of business that they should not personally collect them, but should employ some proper and respectable person for that purpose. . . Then if a person seeks to charge the executors with a loss arising

from the default of an agent whom it is admitted to have been reasonable to employ, does it not lie on him to inform the Court of the circumstances under which the loss arose, the time during which the money was in the agent's hands, the time at which the insolvency took place? This having been done, the executors, on the other hand, would have an opportunity of shewing what efforts they had made and what means they had used for getting in the money, and what, if any, were the difficulties in the way."

## PLEDGE OF SHARES—BLANK TRANSFERS.

The next case requiring notice is *France v. Clark*, p. 257. There F. deposited the certificates of certain shares in a company with C. and also a transfer with the consideration, date and name of the transferee left in blank, as security for £150. C. then deposited them with Q. as security for £250. Q. filled in his own name as transferee, and sent the transfer for registration, and claimed the position of purchaser for value of the shares as against F. It was held by the Court of Appeal that Q. had no title against F. except to the extent of what was due from F. to C. Lord Selborne lays down the law in general terms as follows:—"The defence of purchaser for valuable consideration without notice by any one who takes from another without inquiry an instrument signed in blank by a third party, and then himself fills up the blanks, appears to us to be altogether untenable. . . The person who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in a way not *ex facie* fraudulent) as against a *bona fide* holder for value without notice; but it has been repeatedly explained that this estoppel is in favour only of such a

## RECENT ENGLISH DECISIONS.

*bona fide* holder; and a man who, after taking in blank, has himself filled up the blanks in his own favour without the consent or knowledge of the person to be bound, has never been treated in English Courts as entitled to the benefit of that doctrine. He must necessarily have had notice, that the documents required to be other than they were when he received them in order to pass any other or larger right or interest, as against the person whose name was subscribed to them, than the person from whom he received them might then actually and *bona fide* be entitled to transfer or to create; and if he makes no inquiry he must at the most take that right (whatever it may happen to be) and nothing more. He cannot, by his own subsequent act, alter the legal character, or equitable operation of the instrument."

## WILL—SPECIAL POWER OF APPOINTMENT—LAPSE.

In the next case, *Holyland v. Lewin*, p. 266, the point decided is briefly this, that the 33rd section of the Wills Act (R. S. O. cap. 106, sec. 35), which enacts that a devise or bequest to a child of the testator who dies in the lifetime of the testator leaving issue shall not lapse does not apply to an appointment under a special power. In delivering the judgment of the Court of Appeal, Lord Selborne says: "The words 'devise' and 'bequeath' are terms of known use in our law, the former from Glanville's time and earlier. In their ordinary sense they signify the declaration of a man's will concerning the succession to his own property after his death. Such a devise or bequest operates (on the subjects which either by common or by statute law, or by custom, can so be disposed of) by virtue of the will, and of that alone. On the other hand, an appointment under a limited power operates by virtue of the instrument creating the power, the execution when valid being read into and deriving its force from that instrument. . . . It

follows, we think, legitimately from these premises that the words 'devise' or 'bequest,' when read in the Wills Act without any indication of an intention that they should apply to appointments under power, ought, *prima facie*, to be understood in their ordinary sense, viz., as referring to a gift by will of the testator's own property, and nothing else."

## FRESH EVIDENCE ON APPEAL.

The case of *In re Leonard & Ellis Trade-mark*, p. 289, does not appear to call for notice, except as to the dictum of Cotton, L. J., at p. 302, where, speaking of permitting the adducing of fresh evidence on appeal, he says: "In my opinion, it is most dangerous to allow parties, when they have taken their stand at the trial of a particular question on certain evidence, relying either on the sufficiency of their own or the deficiency of their opponent's evidence, afterwards to come, when they find that they have miscalculated the effect of it, and ask to be allowed to produce evidence which they think will meet the point of the case. . . . I have a great dislike to allowing evidence to be adduced after there has been a trial in order to cover a blot which has been pointed out by the result of the trial."

## INJUNCTION TO RESTRAIN SLANDER.

The next case, *Hermann Loog v. Bean*, p. 306, is an exceedingly interesting one, being apparently the first instance of an injunction being granted to restrain slanderous statements. The plaintiffs sought to restrain the defendant, who had been an agent of theirs, and whom they had dismissed from their employ, from making slanderous statements injurious to their business, to their customers and other persons. The Court of Appeal upheld Pearson, J., in granting the injunction as to statements made to customers, the plaintiffs' counsel not persisting in demanding it as to other persons. Cotton, L.J., says,

## RECENT ENGLISH DECISIONS.

p. 313: "Here is a man, who had been in the employ of the plaintiffs, making to their customers slanderous statements with regard to the business of the company, and trying to induce the customers not to pay the sums which they owe to the plaintiffs. The Court has of late granted injunctions in cases of libel, and why should they not also do so in cases of slander? It is clear that slanderous statements, such as were made to old customers in this case, must have a tendency materially to injure the plaintiffs' business; they are slanders, therefore, spoken against their trade. It is not necessary, therefore, in my opinion, to show that loss has actually been incurred in consequence of them. If they are calculated to do injury to the trade, the plaintiffs may clearly come to the Court. There is, no doubt, more difficulty in granting an injunction as regards spoken words than as regards written statements, because it is difficult to ascertain exactly what is said. But when the defendant is proved to have made certain definite statements, such as are mentioned in the order, in my opinion an injunction is properly granted to prevent his repeating them. The defendant, though no doubt the tongue is an unruly member to govern, must take care that he keeps his tongue in order, and does not allow it to repeat those statements which he is by the injunction restricted from uttering." Bowen, L. J., says, at p. 315: "Now, has the Court jurisdiction to grant such an injunction? It seems to me to be clear that it has. There is a wrong done which is actionable if it has been committed, and which naturally would, if repeated or persisted in, affect injuriously the property or trade of the plaintiff company. It has been held since the Judicature Act, that a plaintiff is entitled to the protection of the Court against a wrong of that sort which is contained in a written document; that is

to say, the Court will restrain the publication of a libel which is immediately calculated to injure the property and trade of the person against whom it is directed. Then can there be any distinction in principle between a slander which is contained in a written document and a slander which is not? In the case of *Thorley's Cattle Food Company v. Massam*, L. R. 14 Ch. D. 763, and *Thomas v. Williams*, *ib.* 864, the Court interfered to restrain the slander which was placed upon paper; so that clearly in the case of such written slander *as is naturally attended with injury to property and business*, the Court has jurisdiction to interfere, and it appears to me that the same principle must apply to spoken slander."

## MANDATORY INJUNCTION.

In this case, also, a mandatory injunction was also asked for to compel the defendant to withdraw certain notices as to forwarding letters which he had given to the post-office authorities. It was objected that the Court would not grant such an injunction upon interlocutory application, except in special cases. It is worth while, therefore, to call attention to the words of Cotton, L. J., at p. 314:—"This Court, when it sees that a wrong is committed, has a right at once to put an end to it, and has no hesitation in doing so by a mandatory injunction, if it is necessary for the purpose."

## LECTURE—PUBLICATION OF—INJUNCTION.

In *Nicols v. Pitman*, p. 375, Kay, J., granted an injunction to restrain the defendant from publishing a certain lecture which had been delivered by the plaintiff, at a certain workingman's college, and which the defendant had taken down in shorthand, and published. Kay, J., referred at length to Lord Eldon's judgment in *Abernethy v. Hutchinson* 3 L. J. (Ch.) 209, and says as to it:—"It is quite true that the learned judge seems at one

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moment to refer to the ground of property and at another to that of contract. But I take his meaning to be this: that when a lecture of this kind is delivered to an audience, especially when the audience is a limited one admitted by tickets, the understanding between the lecturer and the audience is that whether the lecture has been committed to writing beforehand or not the audience are quite at liberty to take the fullest notes they like for their own personal purposes, but they are not at liberty, having taken these notes, to use them afterwards for the purpose of publishing the lectures for profit. That is the ground upon which I am going to decide this case."

A. H. F. L.

## REPORTS.

### CANADA.

#### SUPREME COURT OF CANADA.

##### BADENACH V. SLATER.

##### *Fraudulent preference—Trust for creditors—Power to sell.*

A digest of the decision in this case will be found at p. 258, *ante*. See also editorial in another column.

STRONG, J.—At the argument I had some doubt upon the point raised by this appeal, which subsequent consideration has however entirely removed. *Pickstock v. Lyster*, 3 M. & S. 371, having shown that an assignment for the benefit of creditors generally was not avoided by the 13 Elizabeth, but was good against a particular execution creditor of the assignor, I think it must necessarily follow that every power or trust conferred upon the trustee for creditors which is for their benefit must also be valid. I cannot agree that a clause which invests such a trustee with a discretionary power which so far from being necessarily prejudicial to the general body of creditors is actually essential to their protection, renders the assignment invalid merely because it "hinders and delays" them. It is to be presumed that the trustee will do his duty, in other words

that he will execute the trust in the interest of the creditors exclusively, and that he will not sell on credit unless it is for their benefit that he should do so. If he fails in his duty, or proposes to act in contravention his conduct can be controlled by a Court of Equity, who can also supersede him in the office of trustee. Supposing there are but a small body of creditors, and that the assignment is made to them directly without the intervention of any trustee, the property being admittedly less in value than the debts there should be no reservation of an ulterior trust for the assignor, could it be said that such a clause as this conferring on them a power to do what they like with their own was void? Then what difference does it make that a trustee is interposed, and a resulting trust declared for the debtor? To the amount of the debts the goods are still the property of the creditors, who through their trustees have the control and management of them for their own behoof. Then to say that the trustee may or may not in his discretion sell on credit is but to say that he shall dispose of the property in the way most advantageous for the whole body of creditors.

The truth is that every argument adduced in support of the contention that such a clause as this necessarily makes an assignment fraudulent strikes at the doctrine of *Pickstock v. Lyster*, for so soon as it is once admitted that a particular creditor may lawfully be hindered or delayed by an assignment for the whole body of creditors it necessarily follows that every reasonable and useful power for the protection of the whole body of creditors must also be valid. Whilst I thus hold as to the effect of such a clause as this in the abstract, I do not of course mean to say that a clause authorizing a sale on credit may not, coupled with other circumstances, lead to an inference of fraud which would invalidate the deed of assignment; all I mean to determine is, that by itself such a provision is not illegal. I am of opinion that this is the law under 13 Elizabeth, and that we need not seek the aid of the Provincial statute to enable us to reach such a decision.

I am of opinion that the appeal must be dismissed with costs.

FOURNIER, J., concurred.

HENRY, J., stated that as no case of fraud or collusion had been made out, he was of opinion that the appeal should be dismissed with costs.

GWYNNE, J.—I concur in the opinion that this appeal should be dismissed.

The clause at the end of the second sec. of chap. 118 of the Revised Statutes of Ontario appears to me to have the effect of giving statutory recognition to a doctrine already well established by the decisions of the courts, viz.: that a deed of assignment made by a debtor for the purpose of paying and satisfying rateably and proportionably, and without prefer-

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ence or priority, all the creditors of such debtor their just debts, shall not be construed to be a deed made either to defeat or delay the creditors of such debtor, or to give one of such creditors a preference over another, unless then there be something on the face of the deed which is assailed here as being void against creditors which *ex necessitate rei*, has the effect of raising a presumption *juris et de jure* that the intention of the debtors in executing the deed was to defeat or delay their creditors in the sense in which such an act is prohibited by the statute, for there is no suggestion that the deed gives to any creditor a preference over another. The question of intent was one of pure fact to be passed upon by the jury who tried the issue, and the proper way of submitting that question to them would be to say, that if they should find the intent of the debtors in executing the deed was for the purpose of paying and satisfying rateably and proportionably and without preference or priority all the creditors of the defendants their just debts, they should find that it was not made with the fraudulent intent which is prohibited, and that they should render their verdict for the plaintiff.

The words of the deed as affects the selling on credit, in short substance are, that the trustee shall as soon as conveniently may be collect and get in all sums of money due to the debtors and sell the real and personal property assigned by auction or private contract as a whole or in portions for cash or on credit and generally on such terms and in such manner as he shall deem best or suitable having regard to the object of these presents; such object as expressed in another part of the deed being to pay and divide the proceeds among all the creditors of the grantors rateably and proportionably according to the amount of their respective claims.

This language as it appears to me, merely expresses an intention that the trustee may at his discretion sell for cash or on credit accordingly as he shall deem best calculated in the interest of the creditors to realize the largest amount for general distribution among them rateably and proportionably according to the amount of their respective claims.

To hold that this clause in the deed operates so as to compel the court to hold as an incontrovertible conclusion of law that the deed was not made and executed as in its terms it professed to be for the purpose of paying and satisfying rateably and proportionably all the creditors of the debtors their just debts, but was made and executed with intent to defeat and delay such creditors appears to me to involve a manifest perversion of the plain language of the deed, and such a construction of the clause in question is not warranted by any decision in the English Courts or in those of the Province of Ontario from which this appeal comes, and there is in my judgment

nothing in it which so recommends it as to justify us in making a precedent by its adoption. If it be said that the clause in question, although not operating as such a conclusion of law, at least affords evidence of the deed having been executed with an intent to defeat and delay creditors, and not for the purpose of paying and satisfying the creditors their just debts rateably and proportionably, and for that reason was proper to have been submitted to the jury to be taken into consideration by them, the answer is, that such a point should have been made at the trial, and not for the first time, as it was here, in the Court of Appeal for Ontario in the argument of the counsel for the appellant in his reply. And as the jury have rendered a verdict for the plaintiff, they must on this appeal be taken to have found as matter of fact that the deed was not executed with intent to defeat and delay creditors, but was executed for the purpose of paying and satisfying them their just debts rateably and proportionably.

Unless there be something on the face of the deed which in law nullifies and avoids it, the verdict of the jury in maintaining its validity must be upheld. Upon this appeal nothing as it appears to me is open to the appellant to contend but the points contained in his motion in the Common Pleas Division of the High Court of Justice for Ontario for a rule for a non-suit or judgment to be entered for the defendant. The judgment of this Court refusing such rule, sustained by the Court of Appeal for Ontario, is what is before us, and I am of opinion that the verdict of the jury should be upheld, and that the rule moved for was properly refused.

I have, however, carefully perused the judgments in the case of *Nicholson v. Leavitt*, so much relied upon by the counsel for the appellant, as it was decided by the Court of Appeals for the State of New York, as reported in 6 N. Y. R. 10, and also the same case as decided in the Superior Court of the State and reported in 4 Sandf. 254. The Court of Appeals when reversing the judgment of the Superior Court seem to me to rest their judgment in a great degree upon a proposition which they lay down, to the effect that a debtor might with equal justice prescribe any period of credit which to him should seem fit, as that which the trustee should give upon sales of property assigned to him as assumed to vest in him a discretion to sell upon credit, if such a mode of selling should seem reasonable and proper and in the best interests of the creditors.

With the utmost respect for the high authority of the Court of Appeals for the State of New York, this seems to me to be equivalent to saying, that to express an intent of vesting in the trustee authority and permission to exercise his best judgment by selling on credit, if such mode of disposing of the property should seem to be in the interest of the credi-

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tors whose trustee he is made, and to express an intent of divesting such trustee of all such authority and to prescribe to him a rigid unalterable course, which, in the discharge of his trust, he must pursue against the dictates of his own judgment, and against the will of the creditors whose trustee he is made, are one and the same thing. There are other parts of the reasoning upon which this judgment is rested which seem to me to lead to the conclusion that delaying a creditor in obtaining satisfaction of his debt by the particular process of execution in a suit at law is equally a defeating and delaying of him within the prohibition of the statute as the vesting the trustee with authority in his discretion to sell upon credit, if such would be a reasonable and proper course to pursue in the interest of the creditors, and that the former is not within the prohibition of the statute is established in our courts beyond all controversy.

Upon the whole, therefore, after a careful perusal of both judgments, I must say that that of the Superior Court is, in my opinion, based upon much sounder reasoning, and is more reconcilable with the English authorities than is that of the Court of Appeals, and I think it to be a sound rule to lay down as governing all cases like the present, that an assignment of property by an insolvent debtor can never be declared void under the statute in question here, if in the opinion of the tribunal for determining matters of fact in each case, the actual intent of the debtor, as a matter of fact, in executing the deed was, as the jury must be taken to have found that fact in this case, to provide for the payment and satisfaction of the creditors of the debtor rateably and proportionably without preference or priority according to the amount of their respective claims; and, in my opinion, the mere fact that the deed contains a clause authorizing the trustee in his discretion to sell the property assigned, or any part of it, on credit, if such a mode of selling it should seem reasonable and proper and in the interest of the creditors, does not justify as a conclusion of law an adjudication that the grantor's intent in executing the deed was not to provide for such payment, but on the contrary, in violation of the provisions of the statute in that behalf, was to defeat and delay his creditors.

## COUNTY COURT OF THE COUNTY OF YORK.

### COLLINS V. BALLARD.

*Poundkeepers' Act—R. S. O. Cap. 195—Construction of—Replevin.*

Where A. impounded B.'s horse under section 8, R. S. O. cap. 195, and gave usual statutory notices, but notice under section 8 was given a few hours late. *Held*, that the section was directory only, and a substantial compliance was sufficient.

*Semble*, Replevin will only lie (1) for improper or unlawful impounding; (2) where extortionate claim made and no tender of reasonable or proper amount, or (3) where there has been some improper dealing with animal distrained.

[Toronto, June 24.—Co. Ct. Term.]

The facts sufficiently appear in judgment of

McDOUGALL, J. J.—This is an action of replevin brought to recover a horse belonging to the plaintiff, alleged to be wrongfully detained by the defendant.

The horse, it appears, got astray and came into the defendant's premises on the 23rd September, 1883. The defendant lives in the Township of Whitchurch, and a by-law of the township was proved by which it was declared illegal for animals to run at large upon the highways in the township. The defendant, instead of sending the animal to the pound, gave a notice under R. S. O. cap. 195, sec. 8, and also advertised the animal for over three weeks in the *Newmarket Era*, a paper published in the municipality (sec. 10). Before the expiration of two months (sec. 12), the owner (the plaintiff) discovered the whereabouts of his horse, and came to the defendant's place and demanded the possession of his animal. The defendant expressed his willingness to give up the horse upon being paid his charges for its keep, which he claimed at the rate of 40 cents a day. This amount it was proved was the per diem allowance that poundkeepers in the municipality were by by-law permitted to charge. The plaintiff thought the charge excessive or improper, and declined to pay it. He did not offer to pay any sum whatever, and left the defendant's place without getting his horse. Shortly afterwards—the two months having expired (sec. 12), the defendant caused to be posted up the sale notices under sec. 13, and mailed a copy of such notice to the plaintiff. Before the day named for the sale the plaintiff replevied the animal, and this action is trying his right to recover possession of his horse. At the trial, with the consent of the parties, I struck out the jury notice and tried the case myself, and at the conclusion of the evidence reserved my judgment.

The defendant for his defence, besides the general issues, sets up a lien and claims the right to

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detain the animal for the expenses incurred by him in its keep, alleging the request of the plaintiff to provide food and care, etc. He also sets up his right to detain the animal under the provisions of the Poundkeepers' Act (R. S. O. cap. 195), he having asserted his privilege under that statute of retaining the stray animal himself (it having come upon his premises), instead of sending it to the township pound, averring the performance of all the duties cast upon him by the statute in such a case, viz., the giving of all the statutory notices, etc.

It was objected for the plaintiff that the notice given to the clerk of the municipality was not given within forty-eight hours after the horse came upon the defendant's premises, and that the advertisement in the *Era* was not a copy of the notice served upon or left with the Township Clerk, and the plaintiff's counsel argues that by reason of these alleged informalities the defendant is precluded from setting up his right to detain the horse under the statute.

As to the first objection, the notice to the clerk was given on the Tuesday afternoon, 25th September, about 3 o'clock, p.m. The horse came into the defendant's premises about 8 o'clock on the preceding Sunday morning, the 23rd September. The notice was, therefore, not actually given within forty-eight hours.

I think section eight of the statute may be treated as being *directory* only. Not that an entire omission to give the notice might not be fatal, but the giving of it in fifty-five hours instead of within forty-eight hours, where there is yet two months to elapse before a sale of the impounded animal could be legally had, is, I think, a sufficient compliance with the spirit and intention of the statute. It is an Act intended to be administered in country districts, and by local municipal authorities, and not by lawyers; and in some parts of the country where the inhabitants are sparsely settled, and the roads are bad, the distance from and the accessibility of the clerk's office in cases that can readily be imagined, would render a strict compliance with the statute on the mere question of time—as to a few hours—impossible.

Here the notice was given and intended to be a compliance with the statute, and no ill consequence has affected the plaintiff by the few hours' delay. As is said by Chief Justice Wilson in *Cotter v. Sutherland*, 18 [U. C. C. P. 407, in speaking of the necessity of a strict compliance with the statutory directions to be observed by the treasurer of a municipality in order to effect a valid sale of lands for arrears of taxes. "A total neglect may have a different effect from a partial neglect. The omission to advertise for one day of a certain period

would be a different thing from an absolute neglect to advertise at all. Neither of these extreme cases can well be supported when the objection is taken."

Further, at pp. 408, he says: "I do not forget that *shall* is to be construed as *imperative*. I think this is a case in which there is something in the context or other provisions of the Act indicating a different meaning or calling for a different construction."

In construing a statute such as this looking to its object, and the subject matter legislated upon, I think that the rule may perhaps be safely stated in the somewhat broad language of a note to the American edition of Darriss on Statutes. (Ed. of 1874, pp. 226, note): "That when a statute directs certain proceedings to be done in a certain way or at a certain time, and the form or period does not appear essential to the judicial mind the law will be regarded as *directory*, and the proceedings under it will be held valid though the command of the statute as to form and time has not been strictly obeyed; the time and manner not being the essence of the thing required to be done."

The second objection taken by the plaintiff was that the advertisement in the *Era* was not a copy of the notice filed with the clerk. As to this objection, I rely upon similar reasoning to that just expressed with reference to the first objection to overrule it also. The advertisement in the newspaper was not an exact or verbatim copy, but it contained all the necessary information that the statute could have intended, viz., the description and marks of the animal; the date of its coming into the defendant's premises, and his address.

Having then disposed of these two objections in favour of the defendant—Had the plaintiff the right to replevy the animal without first paying reasonable charges for his keep from the time it came into the defendant's possession until he (the plaintiff) learned of its whereabouts?

Section 13 of the Act directs that the notices of the sale to be given under the Act "shall specify the time and place at which the animal will be publicly sold if not sooner replevied or redeemed by the owner, or some one on his behalf, paying the penalty imposed by law (if any), the amount of the injury (if any), claimed or decided to have been committed by the animal to the property of the person who distrained it, together with the lawful fees and charges of the poundkeeper, and also the fence-viewers (if any), and the expenses of the animal's keeping."

Section 14 imposes the duty upon the poundkeeper or person impounding to furnish "sufficient food, water and shelter during the whole time that such animal continues impounded or confined

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## COLLINS V. BALLARD—RECENT ENGLISH PRACTICE CASES.

Section 15 gives the right to the person furnishing the food to recover the value thereof from the owner of the animal.

Section 16 enables him to recover it in a summary manner before a Justice of the Peace, and directs the Justice in estimating the value or amount to adhere as "far as applicable to the tariff of pound-keepers' fees and charges established by the by-laws of the municipality."

Sections 17 and 18 authorize the person entitled to recover these charges instead of proceeding before a justice to bring about a public sale of the animal.

Now, where an animal has been retained by the individual upon whose premises it has trespassed instead of being sent to the public pound, I think it is intended by the statute that if his impounding has been legal, and he has observed otherwise the statutory provisions, that such person should be entitled to detain the animal until his proper charges are paid. Replevin will, in my opinion, only lie:

1st. Where there has been an improper or unlawful impounding, and hence no right created in favour of the person impounding to make a charge.

2nd. Where there has been an extortionate claim made, and there has been a *tender* of a reasonable and proper amount, and

3rd. Where there has been some improper dealing with the animal impounded, by the person impounding, such as using or working the animal, which act or acts would render it inequitable or unjust on his part to make any claim for care or keep.

In any other cases than these I think the intention of the Act is that the person impounding should only be compelled to give up the animal upon receiving payment of his reasonable charges.

In the present case I think the charges made were reasonable. They were estimated upon the basis of the township tariff for poundkeepers. I think it was amply proved that the animal was well cared for.

It is admitted that no tender of any sum whatever was made before action under the writ issued herein.

I think also that the defendant has substantially observed all the provisions of the statute, which were precedent, to his right to claim for the expenses he was put to in maintaining and caring for the animal.

Under these circumstances I shall enter a verdict for the defendant with full costs of suit, but upon payment by the plaintiff to the defendant of the latter's claim, \$23, for the keep of the animal, and also upon payment of the defendant's costs of this

suit within one month from date, I will allow the plaintiff to enter a judgment in his own favour for twenty cents without costs. I allow this option to prevent further litigation between the parties hereto, upon the replevin bond or otherwise.

## RECENT ENGLISH PRACTICE CASES.

## IN RE SPEIGHT, EX PARTE BROOKS.

*Appeal—Preliminary objection—Costs.*

[L. R. 13 Q. B. D. 42.]

This was an appeal from an order by a County Court Judge making absolute an order *nisi* for an injunction. The respondent took a preliminary objection, which was sustained.

CAVE, J.—The party intending to take a preliminary objection, which may be fatal, should give notice to the other side of his intention at the earliest possible moment. Then if the party having received such a notice chooses to go on with his appeal, he knows he does so at the peril of having to pay the costs if he fails. But when such an objection is taken at the very last and succeeds, I think the costs ought not to be allowed.

## HOWELL V. DAWSON.

*Imp. Jud. Act, 1873, sec. 25, sub-sec. 8—Ont. Jud. Act, sec. 17, sub-sec. 8—Interpleader issue—Appointment of Receiver.*

[L. R. 13 Q. B. D. 67.]

An interpleader issue being ordered to try the right to goods seized in execution, the court or a judge may order that instead of a sale by the sheriff, a receiver and manager of the property be appointed, as in this case where the goods seized were cabs and horses, used in the business of a cab property, which was a going concern.

## HARVEY V. CROYDON UNION RURAL SANITARY AUTHORITY.

*Consent order—Withdrawal of consent.*

*Held*, by Court of Appeal, when counsel by the authority of their clients consent to an order, the clients cannot arbitrarily withdraw such consent, though they may apply to be relieved from their consent, on the ground of mistake, or surprise or for other sufficient reason.

[L. R. 26 Ch. D. 249.]

COTTON, L. J.—If a consent is given through error or mistake, there can be no doubt that the court will allow it to be withdrawn if the order has not been drawn up. But the question is very dif-

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ferent whether when counsel, being duly authorized, have given a consent, there being no mistake or surprise in the case, the party can arbitrarily withdraw that consent. . . . There being no authority which is binding on us to the contrary, we must decide according to what we think the right course, and it must be understood henceforth to be the rule that a consent given by the authority of the client cannot be arbitrarily withdrawn.

### NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

#### QUEEN'S BENCH DIVISION.

##### RE MUSKOKA AND GRAVENHURST.

##### *Municipal Act—Arbitrators—Award, etc.*

An award by arbitrators under Municipal Act, R. S. O. cap. 174, not invalid though made more than a month after appointment of third arbitrator, notwithstanding sec. 377 of Act.

By sec. 378, no member, officer or person in a corporation's employment, interested in any arbitration, nor any person so interested shall act as an arbitrator under Act.

*Held*, that the disqualification of interested persons is absolute, and waiver of or acquiescence in the appointment of an interested person will not validate it. By sec. 383, arbitrators are to file with the clerk of the Council, the notes of the evidence taken. There being two councils interested in this arbitration, the arbitrators did not know with which clerk to file the evidence and did not file it.

*Held*, award not thereby invalidated.

The award having been directed to be made within a year by an order of the Chancery Division, where the parties were litigating concerning it, the Court refused to entertain the merits, but held that for that purpose, the motion should be transferred to that Division.

##### RE ONTARIO AND QUEBEC RAILWAY CO. AND TAYLOR.

##### *Railway Co.—Expropriation—Award—Compensation for possible damage by falling trees, etc.*

The right of a railway company to cut down trees for six rods on each side of the railway under Consolidated Railway Act, 1879, sec. 7,

sub-sec. 14, is entirely distinct from their right to expropriate land for the road, and has nothing to do with the compensation to the owner for land so expropriated, and forms a distinct subject of arbitration.

*Held*, therefore, that an award was bad in allowing compensation to the owner of land expropriated by a railway company for the damage that might accrue to the owner by the possible exercise of the right to fell trees adjacent to the expropriated lands.

*Quare*, whether under above Act more than the value of the land actually taken can be allowed as the Act does not contain a section equivalent to sec. 7 of R. S. O. cap. 165, which includes compensation for damages to lands injuriously affected.

*Held*, that the possible damage to land from greater exposure to winds and storms, and the greater liability to injury by fire by reason of the working of the railway were contingencies too remote to be considered in estimating the amount of compensation where there were no buildings to be endangered.

The notice by the railway company, included compensation "for such damages as you may sustain by reason or in consequence of the powers above mentioned."

*Held*, sufficient to allow the arbitrators to award damages resulting to the owner from the expropriation.

#### CHANCERY DIVISION.

Osler, J.]

[March 29.

Full Court.]

[Sept. 8.

##### JOHNSON V. KRÄMER.

##### *Will—Construction—Express trust—Executors and trustees—Statute of limitations—R. S. O. c. 108.*

A testator, J., after ordering all his past debts and funeral expenses to be paid out of his estate, devised to his wife, H. J., all his real estate in L., "during her natural life for the use and support of herself and family, and in case my said wife should at any time think proper to sell my said estate, it shall be the duty of my executors to sell the same with her consent to the best advantage, and the proceeds thereof to be distributed as follows: One-third to be given to my said wife for her use and support; one-third to be appropriated

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in educating and bringing up my children; and one-third to be laid out in wild lands to be equally divided amongst my children. But if my said wife should not think proper to sell my said estate, then the same shall be divided amongst my children, their heirs or assigns, after the death of my said wife, share and share alike."

He then nominated P. his executor, "with full power and authority to act in the same," who took out Probate of the will.

The testator died Dec. 12th, 1838, leaving H., his wife, and three children surviving him. Afterwards H. executed a power of attorney, appointing W. J. her attorney to make sale of and convey the said lands so devised as above mentioned, and on February 7th, 1846, H., by deed of that date purported to convey, in consideration of \$250, the lands in question to P., the executor aforesaid. The words of grant being "remise, release, relinquish and quit claim," *habendum* to P., his heirs and assigns. Under this deed P. obtained and remained in possession of the land until his death, on March 30th, 1882, when he devised it to K. and K. in trust for the purposes of his will of which he appointed K. and K. his executors.

H. died on November 22nd, 1872, and this action was brought on November 6th, 1883.

It was conceded that the title of the children of J. was barred by the Statute of Limitations unless P. could be treated as an express trustee under sec. 30 of R. S. O., c. 108.

*Held*, affirming the decision of Osler, J. A., that the proper construction to be placed on the will was that a life estate was given to the testator's widow with a power of sale to the executors during her lifetime with her consent, and remainder in fee to the children in the event of the non-execution of the power. Unless and until the consent of the widow was given, the power of sale did not exist and the executor had no duty to perform in relation to the lands, and he did not take, nor was it necessary that he should take, the legal estate. As he never was required to execute the power he never became trustee, and the plaintiff's title was barred by the Statute of Limitations.

*Per* PROUDFOOT, J.—There was no devise of the estate to the trustee. The implied estate to enable him to fulfil the trust would only arise when the trust did. Meantime the estate de-

scended to the heirs, and as the trust never arose the trustee never had any estate under the will.

*B. B. Osler, Q.C.* and *T. S. Plumb*, for the plaintiff.

*W. Cassels, Q.C.*, for the defendant executors.

Proudfoot, J.]

[September 17.]

### CASNER V HAIGHT.

*Redemption by wife of a mortgagor after she had joined in the mortgage, and after foreclosure against the husband by the mortgagee, but during her husband's lifetime—Demurrer.*

Plaintiff being the wife of A. W. C., who mortgaged his lands, she joining therein for the purpose of barring dower (after foreclosure by the mortgagee against the husband, but during the husband's lifetime), brought an action to be allowed in to redeem the mortgaged premises.

A demurrer to the plaintiff's statement of claim on the ground that the plaintiff had no right, title, or interest in the lands, and that her pleadings affirmed that her husband's interest had been foreclosed, was allowed with costs.

*Moss, Q. C.*, for the demurrer.

*V. McKenzie, Q. C.*, contra.

**LITTELL'S LIVING AGE.** The number of *The Living Age* for 23rd and 30th August, contains The three Poems "In Memoriam," *Quarterly*; Italian University Life in the Middle Ages, *British Quarterly*; A Legend of Vanished Waters, *Scottish*; Un trodden Italy—The Sila Forest, *Contemporary*; The English Church on the Continent, *Fortnightly*; Venice, *Blackwood*; Three Days among the Dutchmen, *Tinsley's*; Madame de Krudener, *Gentleman's*; William the Silent, *Times*; "John Bull et Son Ile" in the Seventeenth Century, and The Business of Pleasure, *Spectator*; Slips of the Tongue and Pen, and Manx Smuggling, *All the Year Round*; with the conclusion of "The Baby's Grandmother," instalments of "Mitchelhurst Place," "Peter Mackey's Three Sweethearts," "Beauty and the Beast," and "Tzigge," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price (\$8) is low; while for \$10.50 the publishers offer to send any one of the American \$4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Little & Co., Boston, are the publishers.

# Canada Law Journal.

VOL. XX.

OCTOBER 1, 1884.

No. 17.

## DIARY FOR OCTOBER.

3. Fri.....First edition English Bible printed 1535.  
5. Sun.....17th Sunday after Trinity.  
6. Mon.....County Court and Surrogate Term (except York).  
Non-jury sitting of County Court (except York).  
8. Wed.....Harrison, C. J., sworn in, 1875.  
11. Sat.....Guy Carleton, Gov. of Canada, 1774. County  
Court and Surrogate Term (except York).  
12. Sun.....18th Sunday after Trinity. Lord Lyndhurst  
died, 1863.

TORONTO, OCTOBER 1, 1884.

THE case of *Herman Loog v. Bean* in the July number of the *Law Reports* which we have noted in our article on recent English decisions, is one of considerable public importance. It establishes that the Court has jurisdiction to grant an injunction to restrain the repetition of slanderous statements affecting trade and property. Injunctions have before been obtained to restrain libels of a like nature, but this is the first precedent for restraining slanders. It is almost to be hoped that the jurisdiction will be extended to other slanders and libels, besides those affecting trade and property. The law of slander and libel has heretofore, as it seems to us, afforded a very inadequate remedy for such injuries. By the time the case is tried and judgment given, the public will have very likely become thoroughly biassed against the unfortunate victim, and have received an impression which it is quite impossible to remove. It will, however, be much more satisfactory, if, as soon as the writ is issued, it is possible to obtain an interim injunction to be subsequently made perpetual, which will effectually clap a muzzle on the slanderer's mouth, and once for all upset the libeller's ink-

bottle. We can imagine a certain railway company commencing an action for an injunction against a newspaper published not a hundred miles off, and the latter finally stopping its injurious comments in consequence. We commend *Herman Loog v. Bean*, and the cases referred to in it, to the notice of the solicitors of the Canada Pacific Railway.

In a note appended to the case of *Re Bingham and Wigglesworth*, 5 O. R. 612, which was an application under the Vendors' and Purchasers' Act, R. S. O. c. 109 s. 3, it is stated that the learned judge, in consenting to hear the petition, said that he did not desire to make a precedent in practice under the Act of entertaining petitions on all questions of a like kind, as he thought he foresaw undesirable consequences, if all questions of title were to be settled in this way, where the existence or validity of the contract was not disputed. The question at issue between the parties in that case was the construction of a deed in the chain of title, and we can conceive of no case in which it would be more eminently fit that the summary proceedings pointed out by the Act should be resorted to. Wherever the construction of the instrument affects the rights of third persons who are not before the Court, it is, we presume, open to the Court either to direct an action to be brought or such parties to be notified, but we should imagine without such express direction it would be always safer for the solicitor to resort in the first place to the summary method of the Act before plunging into an action.

Certainly in entertaining an application

## VENDORS' AND PURCHASERS' ACT—RECENT ENGLISH DECISIONS.

for the construction of an instrument, the learned judge was making no new precedent in *Re East Williams*, 26 Gr. 110; *Givins v. Daniell*, 27 Gr. 502; *Re Eaton Estate*, 7 P. R. 396, this was done, and we think it would be a matter for regret if there should arise any disposition on the part of the judges to compel proceedings by action, in any case fairly within the scope of the summary procedure of the Vendors' and Purchasers' Act. In *re Eaton estate* it was expressly objected that the Court should not on an application under the Act construe an instrument; but Spragge, C., said that the rule invoked in support of that contention only applied "where executors and trustees apply for advice and direction of the Court, an entirely different thing, and with an entirely different object, from the provisions of the statute under which this application is made. If, in order to see whether a good title can be made, it is necessary to construe a will, or any other instrument, under which a vendor makes title, the Court will do it as it would be done upon an enquiry as to title on a bill for specific performance," and in *In re Burroughs*, L. R. 5 Ch. D. 601. James, L. J., thus expressed himself in regard to the scope and object of the corresponding English statute: "My opinion is, that upon the true construction of this Act of Parliament, whatever could be done in chambers upon a reference as to title under a decree when the contract was established, can be done upon proceedings under this Act, and that what this Act has done is this: it has enabled the parties to dispense with the form of a bill and answer, and at once put themselves in chambers in exactly the same position in which they would have been, and with all the rights, which they would have had under the old form of decree." See also the late case of *Re Barwick*, 5 O. R. 710.

## RECENT ENGLISH DECISIONS.

The August numbers of the *Law Reports* comprise 9 App. Cas. pp. 433-594; 26 Ch. D. pp. 433-604; 13 Q. B. D. pp. 197-339; 9 P. D. pp. 121-148.

## CONTRACT FOR DELIVERY OF GOODS BY INSTALLMENTS—REVISION OF CONTRACT.

The first case which demands attention is that of *The Mersey Steel and Iron Co. v. Naylor*, 9 App. Ca. 434, to which we drew attention *ante* vol. 19 p. 63, when it was before the Court of Appeal. The decision of the Court of Appeal has now been affirmed by the House of Lords.

In this case a contract had been entered into between the plaintiffs and defendants for the delivery to the defendants of a quantity of iron in instalments to be paid for within three days after receipt of each instalment. After two instalments had been delivered, a petition was presented to wind up the plaintiff Company, and the defendants, under advice of their solicitor, refused to make any further payments in respect of the second instalment without the sanction of the Court, which they asked the plaintiffs to obtain, thereupon the plaintiffs refused to make any further delivery, although demanded by the defendants. Subsequently the plaintiffs informed the defendants that they should consider the refusal to pay, as a breach of contract releasing the Company from any further obligations. Shortly afterwards a winding up order was granted against the plaintiff Company. The liquidator made no further deliveries, and brought the present action in the name of the Company for the goods delivered. The defendants counter-claimed for damages for non-delivery.

The House of Lords affirmed the judgment of the Court of Appeal, holding that upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim

## RECENT ENGLISH DECISIONS.

the next delivery; and that the respondents had not, by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract, and thereby release the Company from further performance. This agrees with the decision arrived at by the Queen's Bench Division in the *Midland Railway Co. v. Ontario Rolling Mills Co.*, 2 O. R. I.

We may also note that Lord Bramwell expressly repudiated the dictum attributed to him in *Honck v. Muller*, 7 Q. B. D. 92, "that in no case where the contract has been part performed, could one party rely on the refusal of the other to go on," as amounting to a renunciation.

**DISCLAIMER OF LEASE BY TRUSTEE IN BANKRUPTCY OF  
ASSIGNEE OF LEASE—LIABILITY OF LESSEE.**

The next case which demands attention is that of *Hill v. East and West India Dock Co.*, 9 App. Ca. 448—though its importance in this Province since the repeal of the Insolvent Act is diminished.

In this case Hill was lessee of the East and West India Dock Co., and assigned his lease to one Clarke, with the consent of the Company, but on the express stipulation that the assignment should not release or prejudice Hill's liability for the payment of the rent and performance of the covenants; Clarke agreed to indemnify Hill against payment of the rent. Subsequently Clarke filed a petition in bankruptcy, and the trustee in bankruptcy having disclaimed the lease—the Company sued Hill for the rent, and the House of Lords affirming the Court of Appeal, held that he remained liable, and that the disclaimer of the trustee did not operate as a surrender of the lease so as to put an end to the liability of the original lessee upon his covenant, notwithstanding that the Bankruptcy Act, 1869, s. 23, provides that upon a disclaimer by the trustee, the lease "is to be deemed to have been surrendered."

The majority of the House adopted the

law as laid down by James, L. J., in *Ex parte Walton*, 17 Ch. D. 756, where dealing with the same question, he said, "where a statute enacts that something shall be deemed to have been done, which, in fact and truth, was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. Now the bankruptcy law is a special law, having for its object the distribution of an insolvent's assets equitably amongst his creditors and persons to whom he is under liability, and upon this *cessio bonorum* to release him under certain conditions from future liability in respect of his debts and obligations. That being the sole object of the statute it appears to be legitimate to say that when the statute says that a lease which was never surrendered, in fact (a true surrender requiring the consent of both parties, the one giving up and the other taking), is to be deemed to have been surrendered, it must be understood as saying so with the following qualification, which is absolutely necessary to prevent the most grievous injustice, and the most revolting absurdity—"shall, as between the lessor on the one hand, and the bankrupt, his trustee and estate, on the other hand, be deemed to have been surrendered." Lord Bramwell, who dissented, considered this method of construction too much like legislation.

**CHARTER PARTY—CONDITION AS TO LOADING.**

The case of *Grant v. Todd*, 9 App. Cas. 470, turned upon the construction of a charter party which provided that the vessel should proceed to a certain dock, "cargo to be supplied as fast as steamer can receive. . . . Time to commence from the vessel being ready to load and unload and ten days on demurrage, over and above the said lay days, at £40 per day, except in case of hands striking work, or frosts or floods, or any other unavoid-

## RECENT ENGLISH DECISIONS.

able accidents preventing the loading." The ship arrived at the dock and loaded part of the cargo; a frost then set in and made a canal, which communicated with the dock, impassable, so that the remainder of the cargo, which was ready at a wharf on the canal, could not for several days be brought in lighters to the dock. The dock itself was not frozen over, and if the cargo had been on the dock the loading might have proceeded. And it was held by the House of Lords, affirming the Court of Appeal, that the frost did not prevent the loading within the meaning of the exception.

The point was neatly put by Lord Fitzgerald: "It seems to me the exception applies only where the accident prevents the loading at the place of loading, and not where it prevents or retards the transit or conveyance of the cargo to the place of loading. The shipper was bound to have a full cargo at the place of loading, and he took on himself all risks consequent upon delay in transit. If he had had it there it could have been loaded within the lay days, and no case of demurrage could have arisen."

## POWER OF ATTORNEY TO SELL AND PURCHASE.

Before closing the number containing the appeal cases, we may briefly notice the Indian case of *Yonmenjoy Condoo v. Watson*, 9 App. Ca. 561, which is one of general interest, turning on the construction of a power of attorney. The power in question authorized the donee "from time to time to negotiate, make sale, dispose of, assign and transfer" government promissory notes, and "to contract for, purchase, and accept the transfer" of the same, and "for the purposes aforesaid to sign for me and in my name, and on my behalf, any and every contract and agreement, acceptance, or other document." The question to be determined was whether this power authorized a

pledge of the government notes as well as a purchase and sale thereof, and the Judicial Committee determined that it did not.

## RIGHT OF WAY—UNITY OF POSSESSION OF TENEMENT AND WAY.

In the Chancery Division, the first case which calls for attention is that of *Bayley v. Great Western Railway Co.* (26 Ch. D. 434 C. A.). The defendants, under the powers of their Act, had purchased a piece of land on which was a stable. By the conveyance to the Company the premises were granted, together with "all rights, members, or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member thereof." The vendor had, many years previously, made a private road from the highway to this stable over his own land, for his own convenience, and had used it ever since. The soil of the road was not conveyed to the Company, and no express mention of it was made in the conveyance. The plaintiff refused to allow the Company to use the road, and a special case was stated for the opinion of the Court as to whether or not, under the circumstances, the Company had any right of user of, or right of way over, the road; and it was held by the Court of Appeal, affirming the judgment of Chitty, J., that, notwithstanding the unity of possession of the stables and the private road at the date of the conveyance to the Company, a right of way passed to the Company under the general words of the conveyance following *Kay v. Oxley*, L. R. 10 Q. B. 360, and *Watts v. Kelson*, L. R. 6 Chy. 166. Secondly, that the fact of the stable having been purchased by a railway company, for the purposes of their undertaking, did not preclude them from claiming the right of way, so long as they used the premises as a stable, which they might lawfully do until they were required for the purposes of the railway, or were sold as superfluous land.

## RECENT ENGLISH DECISIONS.

Fry, L. J., thus summed up the principle of construction laid down in *Watts v. Kelson* and *Kay v. Oxley*. "If one person owns both Whiteacre and Blackacre, and if there be a made and visible road over Whiteacre, and that has been used for the purpose of Blackacre in such a way that if two tenements belonged to several owners, there would have been an easement in favour of Blackacre over Whiteacre, and the owner aliened Blackacre to a purchaser, retaining Whiteacre, then the grant of Blackacre either 'with all rights usually enjoyed with it,' or 'with all rights appertaining to Blackacre,' or probably the mere grant of Blackacre itself without general words, carries a right of way over Whiteacre."

This decision would, no doubt, be deemed an authority for the construction of a conveyance under the Short Forms Act, R. S. O. c. 102, s. 4.

COSTS—TAXATION BETWEEN SOLICITOR AND CLIENT—  
NEGLECT.

The next case which it is necessary to notice is another decision of the Court of Appeal. *In re Massey and Carey* (26 Ch. D. 459 C. A.) In this case, the Court held, affirming the decision of the Chancellor of the County Palatine, of Lancaster, that upon a taxation of a bill between solicitor and client the taxing officer may disallow the costs of particular proceedings in an action occasioned by the negligence or ignorance of the solicitor. Cotton, L. J., in delivering judgment, remarked:—"It was said that the taxing master had no jurisdiction to disallow charges on the ground of negligence, but that an action for negligence ought to be brought by the client against the solicitor. In my opinion the question here, is not the same as that which would arise in an action of negligence. The question here is, whether the client should be charged with costs which are referable only to amending a slip made by the solicitor.

We have made inquiries of the taxing masters both of the Chancery, and Common Law, Divisions, as to what has been the practice in such matters. Undoubtedly the taxing master, in the Chancery Division have been more liberal in entertaining objections on the ground of negligence, perhaps because the order for taxation in the Chancery Division directs payment on taxation, while the order in the Common Law Division is only for a stay of proceedings on payment. Probably at common law if the objection was that the *whole action had failed* by reason of the negligence of the solicitor that would be considered a proper question to be decided not by the master, but in an action for negligence. Whether that would be so in the Chancery Division I do not know." This latter point we may remark was considered by Mowat, V. C., in *Thompson v. Milliken*, 13 Gr. 104 and he held that not only particular items might be struck off for negligence, but also, when the objection went to the whole bill, the taxing officer might, on a taxation between solicitor and client, under the common order, disallow the whole bill, upon the authority of *Re Clark* 13 Beav. 173 S. C. 1 D. G. M. and G. 49; *Re Atkinson* 32 Beav. 486.

COSTS—APPORTIONMENT—DEFENDANT APPEARING IN  
TWO CAPACITIES.

The question of the apportionment of costs in a case where a defendant appears in two capacities, in one of which he is entitled to costs, and in the other of which he is not, was discussed by the Court of Appeal in *In re Griffiths, Griffiths v. Lewis*, 26 Ch. D. 465. The action was brought for the administration of the estate of D. Griffiths, and the defendant was the executor of T. Evans, a defaulting executor, whose estate was insolvent. Chitty, J., the judge of first instance, ordered that the defendant should have out of Griffiths' estate, his costs as between solicitor and client, of taking the accounts of the Grif

## RECENT ENGLISH DECISIONS.

fiths' estate, and his costs and charges properly incurred in the administration of the trusts of the will, and one-half the remaining costs of suit. The defendant appealed, but the Court of Appeal sustained the decision of Chitty, J. Fry, L.J., said:—"Strictly speaking, the costs of the action are divisible into three categories: First, those incurred in taking the accounts of the original testator; Secondly, those which are incurred in seeking relief against the defaulting executor; Thirdly, those which come under neither of those heads. The first set of costs ought to be borne by the estate which is being administered; the second ought to be borne by the estate of the defaulting executor; and the third ought to be divided. In substance the judge has adopted this plan."

STATUTE OF LIMITATIONS (21 JAC. 1, c. 16, s. 3)—  
ACKNOWLEDGMENT.

In *Green v. Humphreys*, 26 Ch. D. 474, the Court of Appeal reversed the decision of Pollock, B., 23 Ch. D. 207. The plaintiffs were executors of one J. H., who had lent money to the defendant. By agreement between J. H. and the wife of the defendant certain rents of the T. estate, of which J. H. was trustee, and to which the wife was entitled as *cestui qui trust* for life without power of anticipation, were from time to time applied in reduction of the debt due by the defendant. The consent of the defendant's wife to this application of the rents ceased in 1859 and the rents subsequently accruing were thereafter claimed by the wife and paid to her by the plaintiffs after the death of J. H. in 1880. In 1879 the defendant wrote to J. H.:—"I thank you for your very kind intention to give up the rent of Tyn-y-Burwydd next Christmas, but I am happy to say at that time both principal and interest will have been paid in full." No letter of J. H. as to giving up the rent at Christmas was in evidence. The Court held this letter to be insufficient to take

the case out of the statute. Bowen, L.J., said:—"It is clearly settled that to take a case out of the statute there must be an acknowledgment or a promise to pay, and that when there is a clear acknowledgment that the debt is due from the person giving that acknowledgment, a promise to pay will be inferred. . . . It seems to me that although there is here an acknowledgment of a debt in a sense, there is not a clear acknowledgment of a debt in such a way as to raise the implication of a promise to pay, but on the contrary only in such a way as to exclude the idea of a promise to pay, and to imply that the writer did not undertake to pay," and Fry, L.J., thus paraphrased the letter in question:—"I thank you for your very kind intention to let my wife receive the rents of the estate after next Christmas, but your kindness is apparent not real, for by next Christmas the debt to satisfy which you have been stopping her rents will have been fully satisfied in some manner or another."

MORTGAGE—PRIORITY—NEGLECT IN FIRST MORTGAGEE IN CUSTODY OF DEEDS—FOLLOWING MONEY OBTAINED BY FRAUD.

The case of *Northern Counties of England Fire Insurance Co. v. Whipp*, 26 Ch. D. 482, is of comparatively little importance in this Province owing to the operation of our Registry Act, which in general prevents questions of the kind involved in that suit, from arising here. The plaintiffs were mortgagees, their mortgagor was one Crabtree, the manager of the plaintiff company. On the execution of the mortgage the title deeds were placed, with the mortgage, in the company's safe to which, as manager, Crabtree had access. Subsequently Crabtree took away the title deeds and mortgaged the property to Mrs. Whipp, the defendant, who advanced her money in ignorance of the previous mortgage to the plaintiff company. The Court of Appeal held (reversing the decision of the

## RECENT ENGLISH DECISIONS.

Vice Chancellor of the County Palatine, of Lancaster) that the mortgage of the plaintiffs had priority over that of Mrs. Whipp's. The conclusions drawn from the authorities, by Fry, L.J., who delivered the judgment of the Court, were thus stated by him:—" (1) That the Court will postpone the prior legal estate to a subsequent equitable estate: (a) When the owner of the legal estate has assisted in, or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate, of which assistance or connivance—the omission to use ordinary care in inquiry after, or keeping, title deeds, may be, and in some cases has been held to be, sufficient evidence, where such conduct cannot otherwise be explained; (b) Where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate. But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate, on the ground of any mere carelessness, or want of prudence on the part of the legal owner."

One other point was also decided by the Court which is not noticed in the head note—out of the money paid by Mrs. Whipp to Crabtree, £1,900 found its way from Crabtree into the banking account of the plaintiff company and was applied in payment of a larger debt due by Crabtree to the company, the latter, however, having no notice of the source from whence it was derived. On behalf of Mrs. Whipp it was argued that she was entitled to priority to this extent, on the ground that she was entitled to follow this money obtained from her by fraud. But Fry, L.J., disposed of that point thus:—"The proposition that money obtained by fraud can be followed into the hands of persons who take it in satisfac-

tion of a *bona-fide* debt, without notice, is in our judgment devoid of support from principle or authority."

**FRAUD ON BANKRUPT LAW—CONTRACT PURPORTING TO LIMIT RIGHTS OF TRUSTEE IN BANKRUPTCY IN FAVOR OF BANKRUPT.**

The case of *Ex parte Barter*, 26 Ch. D. 510, demands a passing notice, although owing to the repeal of the Canadian Insolvency Act it is not of that importance that it would formerly have been. In that case a contract for building a ship provided that if at any time the builder should cease working on the ship for fourteen days, or should allow the time for completion and delivery of the ship to expire for one month without the same having been completed and ready for delivery; or in the event of the bankruptcy or insolvency of the builder—it should be lawful then and thenceforth for the buyer to cause the ship to be completed by any person he might see fit to employ, or to contract with some other person for the completion of the work agreed to be done by the builder, *and to employ such materials belonging to the builder* as should be then on his premises, and which should either have been intended to be, or be considered, fit and applicable for the purpose. The builder became bankrupt and his materials were used to complete the ship, but it was held that the clause in the contract, so far as it applied to the bankruptcy of the builder, was void as against his trustee in bankruptcy, as being an attempt to control the user of the bankrupt's property after his bankruptcy, and as depriving the trustee of the right to elect whether to complete, or abandon, the contract, as might seem most beneficial for the creditors—and it was held that this clause having been put in force by the buyer on the filing of a liquidation petition by the builder, the user of the builder's materials could not be justified on the ground of a subsequent cesser of work on the ship.

## RECENT ENGLISH DECISIONS.

## A TRAMWAY CO. IS NOT A RAILWAY CO.

The case of *In re Brantford v. Isleworth Tramways Company*, 26 Ch. D. 527, is worth noting as being a judicial determination of Bacon, V. C., that a "Tramway Company" is not a "Railway Company."

## WILL—BEQUEST ON INDEFINITE TRUST—NON-COMMUNICATION OF TRUST TO TRUSTEE IN TESTATOR'S LIFE-TIME.

*In re Boyes, Boyes v. Carritt*, 26 Ch. D. 531, illustrates the danger to which testators expose themselves, of defeating their own intentions by trusting to unattested papers to control the effect of a formally executed will.

Mr. Boyes, the testator, desired to provide for a certain lady and her child, whose names he did not wish to appear in his will; he therefore, on 1st June, 1880, made a will in favour of his solicitor and friend, Mr. Carritt, the defendant, purporting to devise and bequeath all his property absolutely to him, but subject to a verbal understanding that he would give him further written directions as to the persons for whose benefit he was to hold the property.

The testator went abroad and made no further communication to Mr. Carritt of his wishes, and died in April, 1882. After his death two papers were found in his possession. One, dated 10th February, 1880 (which was proved to be a mistake for 1881), was in these words:

"F. B. CARRITT, Esq., I wish you to have £25 of any property of which I may die possessed for the purchase of any trinket *in memoriam*, everything else I give to Nell Brown, formerly Sears, and I appoint you sole trustee, to act at your discretion.

G. E. BOYES."

The other letter was in these terms:

"F. B. CARRITT, Esq.,

DEAR SIR,—In case of my death I wish Nell Brown to have all except £25 in my memory.

G. E. BOYES."

Under these circumstances, the next of kin claimed the property, which consisted of personal estate.

KAY, J., held they were entitled, and that the trust in favour of Nell Brown was void. He said "no case has ever yet decided that a testator can by imposing a trust upon his devisee or legatee, the object of which he does not communicate to him, enable himself to evade the *Statute of Wills* by declaring those objects in an unattested paper found after his death." . . . "The defendant having admitted he is only a trustee, I must hold on the authority of *Muckleston v. Brown*, 6 Ves. 52, *Briggs v. Penny*, 3 Mc. & G. 546, and *Johnson v. Ball*, 5 D. G. & Sm. 85, that he is trustee of this property for the next of kin of the testator."

## MORTGAGOR—RIGHT TO CALL FOR ASSIGNMENT TO THIRD PERSON.

*Alderson v. Elgey*, 26 Ch. D. 567, is a decision under the Conveyancing and Law of Property Act, 1881, s. 15, which provides:—"Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly." In this case a tenant for life who had failed to keep down the interest obtained an order permitting him to redeem; the mortgagee was also entitled in remainder to part of the property covered by the mortgage; and it was held by Chitty J. that the tenant for life could not require an absolute transfer to his nominee under the above section, but only a transfer on such terms as he himself would be entitled to claim a re-conveyance. In Ontario, where we have no such express statutory provision the case would be *a fortiori*.

## RECENT ENGLISH DECISIONS.

## WILL—"UNMARRIED" MEANING OF.

*In re Sergeant, Mertens v. Walley*, 26 Ch. D. 575, Pearson, J., was called upon to give a meaning to the word "unmarried," which occurred in a will, whereby certain property was left to "the unmarried daughters" of the testator's wife's sisters; and he held that although the word might mean "never having been married," or "not having a husband" at the time in question; yet, following the decision of Vice Chancellor Hall in *Dalrymple v. Hall*, 16 Ch. D. 715, the former was its primary and natural meaning of the word:—"Slight circumstances, no doubt will be sufficient to give the word the other meaning, but, if I was asked to construe the word as occurring in an absolutely colourless instrument, I should construe it 'never having been married.'"

## SETTLEMENT OF BUSINESS ON TRUST FOR SUCCESSIVE TENANTS FOR LIFE—LOSSES OCCURRING DURING ONE TENANCY FOR LIFE, HOW MADE GOOD.

In *Upton v. Brown*, 26 Ch. D. 588, a business had been assigned to trustees on trust for successive tenants for life—a receiver had been appointed to carry on the business; during the first tenancy for life the business was carried on by the receiver at a loss; during the life of the second tenant for life, profits were earned, and the short question was—Whether the losses were to be made good out of the subsequent profits, or out of the capital? and Pearson, J., held that they must be made good out of the profits:—"If the receiver had contracted debts in carrying on the business during the life of the first tenant for life, they would have been treated as contracted on behalf of the business generally, and must have been paid out of future profits, if there had been any. I think this loss must be treated as if it had been a debt incurred by the receiver and must be paid in the same way."

## TENANT FOR LIFE—PURCHASE OF REVERSION.

The next case we have to consider is *Re Lord Ranelagh's Will*, 26 Ch. D. 590, which is an important decision, upon the question, whether an assignee of a tenant for life can purchase the reversion, to the prejudice of other *cestuis que trustent* under the same settlement. In that case certain lease hold estates were held by trustees under a will upon trust to renew the lease from time to time, and to hold the same for the benefit of a tenant for life with remainder to certain other parties. The tenant for life assigned his interest, and the lessor having refused to renew, the assignee purchased the reversion, and claimed to hold it absolutely for his own benefit. Subsequently part of the land was expropriated for public purposes and the purchase money paid into court. Pearson, J., held that the assignee of the tenant for life must be deemed to have purchased the reversion for the purposes of the trust, and that subject to the payment of the purchase money, the estate was held by the assignee subject to the trusts of the will; and that the assignee was not entitled to have his interest as tenant for life at the time the land was expropriated, valued and paid to him out of the purchase money. As to the first point, Pearson, J., remarked:—"It is impossible not to say in the present case that considering there was a permanent trust for the renewal of the lease, overriding the interest of the tenant for life, when the renewal afterwards became impossible it was the duty of the trustees (unless it was impossible to do so) to purchase the reversion from the lessors." He further observed that, in this case he was "dealing with a person who, not having the legal estate in the lease in him, assumed to act with reference to that property as if he had the legal estate, and must, I think, be considered to have acted in the place of the real trustees of the lease, and

to have acquired the property for the benefit of all the persons entitled under the will." And as to the second point, he said that at the time of the expropriation, "there was in equity no leasehold in existence. In equity the fee simple had been acquired by W. B. [the assignee of the tenant for life], and that of which he was possessed was not the leasehold interest depending on the life of Lord Ranelagh, but the fee simple which had been exchanged for that leasehold interest. That being so, all that he was entitled to, was the rent of the property which he had acquired in exchange, during the life of Lord Ranelagh, that is simply an interest in the property, during the life of Lord Ranelagh in exchange for the interest in the leasehold during the same life. . . . The tenant for life cannot ask to have the value of his life interest paid out to him, but is entitled simply for his life to the interest of the fund paid into Court."

**WILL—POWER OF SALE, DISCRETIONARY—CONVERSION IMPERATIVE.**

The only remaining case in the August number of the Chancery Division is that of *In re Raw, Morris v. Griffiths*, 26 Ch. D. 601, which was a decision upon the construction of a will. The testator, by the will in question, gave an annuity to his wife, and he gave and bequeathed to his seven children all his real and personal property after deducting the annuity, and after his wife's decease, the annuity, together with all rents, interests, dividends, and profits arising from his estate, to be divided between his seven children equally; and he directed his executors to sell and convert into money his furniture, lands, houses, tenements, and other property whenever it should appear to their satisfaction that such sale would be for the benefit of his children, and all money arising from the sale to be invested for the benefit of his children.

The testator left seven children, one of

whom had subsequently died intestate. The freehold property had not been sold. The questions to be decided were whether the shares of the children of the testator under his will became vested immediately upon his death, and whether the direction in the will to convert was imperative, and operated from the death of the testator; and both were answered in the affirmative by Pearson, J., who held following, *Doughty v. Bull*, 2 p. Wens. 320, that the share of the child who had died must be distributed as if the property had been converted at the death of the testator.

## REPORTS.

### ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

### MARITIME CASES.

CONLON ET AL. V. CONGER.

*Demurrage—Liability of consignor or consignee—Negligence—Construction of bill of lading—"Free in and free out"—Deck-load at "risk of vessel and owners"—Effect of payment into court without defence.*

[St. Catharines, December 31, 1883.]

This case was tried before the County Judge of the County of Lincoln, without a jury.

*McClive*, for plaintiffs.

*Falconbridge*, for defendant.

The facts of the case fully appear in the judgment of

SENKLER, Co. J.:—The plaintiffs allege that they chartered to the defendant their vessel called the *Mary*, for the carriage of a cargo of coal to the city of Kingston, the defendant to load and discharge the cargo, that the cargo was duly carried and the vessel ready to be unloaded within the proper time, but defendant neglected to unload the cargo and delayed the vessel for several days beyond the time allowed by the charter party, and plaintiffs claim damages for this.

The defendant by counter claim alleges that the plaintiffs are indebted to him in \$30 for shortage on the cargo of coal, claiming that plaintiffs received ten tons and 180 lbs. of coal more than they

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delivered. He also pays into court \$40 which he says is enough to satisfy the plaintiff's claim.

The plaintiffs deny the alleged shortage, and assert that any loss occurred through stormy weather and was of the part of the cargo stored on deck. They refuse to accept the money paid into court.

The evidence shews that the plaintiffs' vessel was loaded at Cleveland with a cargo of coal, and sailed with it for Kingston on the evening of the 6th June. There was no charter party in the proper sense of the term, but a copy (admitted to be a true copy), was produced of a shipping note which reads thus :

"CLEVELAND, OHIO, *June 6th*, 1883.

"Shipped by Martin & Co., in good order and condition on board the schooner *Mary*, of St. Catharines, John Cornwall, master, the following articles marked and consigned as per margin to be delivered in like order and condition (danger by fire, collision and navigation only excepted) as addressed on the margin, subject to freight and charges as below.

"All property on deck at the risk of the vessel and owners, 234 tons, St. L. V. Lump Coal. Freight to be one dollar and twenty cents per ton, free in and out.

(Signed) Martin & Co.

P. D. Conger, Kingston, Ont., for Asylum.

The *Mary* arrived at Kingston on the evening of the 11th June, about 8 p.m., and early the next morning the captain reported his arrival to the cashier of the asylum. Coal for the asylum is unloaded at a slip or wharf belonging to it, some distance from the harbour. At the time of the *Mary* arriving at Kingston, another vessel, the *Craftsman*, was lying at this slip discharging a cargo of coal. The *Craftsman* was also carrying coal for the defendant in the same way as the *Mary* was. There was room for two vessels to lie at the asylum slip, but owing to the arrangement of the buildings only one could unload at a time.

Upon being told by the captain, of the *Mary's* arrival, the cashier of the asylum told him he could stay where he was until they were ready to unload him. However, he went to the asylum slip on the morning of the 13th and lay there without anything being done until the 19th, when they began to unload the *Mary* and finished doing so next day.

The plaintiffs' claim is for the delay from the morning of the 12th to the morning of the 19th. They also allege that two days ought not to have been consumed in unloading as the *Mary* could be unloaded in one day, or at most a day and a-half, but it was admitted that but for the other delay no claim would have been preferred for this,

The first question that arises is: What is the effect of the payment of money into Court by the defendant without any other defence except the counter claim of \$30. Is he at liberty to dispute the allegations in the plaintiffs' statement of claim? or, must he be taken to have admitted them? Payment of money into Court is no longer considered incompatible with other defences. A defendant can, as a general rule, deny the plaintiffs' cause of action and at the same time pay money into Court: *Berdan v. Greenwood*, L. R. 3 Ch. D. 251; *Hawhesley v. Bradshaw*, L. R. 5 Q. B. D. 302.

In England the rules of pleading upon which these cases were decided, required defendant to traverse all statements they wished to put in issue. In Ontario, silence of a pleading as to any allegation contained in a previous pleading of the opposite party is not to be construed as an implied admission of the truth of such allegation.

It is, therefore, contended by the defendant that a simple plea of payment into Court here has the same effect as the same plea joined with a denial of the plaintiffs' cause of action has in England. I cannot find any decision in Ontario on the point and it will be safer for me to decide the present case on the assumption that the defendant's contention is correct.

The plaintiffs, in their statement of claim, allege that the defendant delayed the vessel for several days beyond the time allowed by the charter party—no time for unloading is mentioned in the shipping note. The plaintiffs must consequently rely on the implied contract that the vessel would not be detained more than a reasonable time in unloading. When the number of the days are fixed by the contract of affreightment, the merchant will be liable for any delay beyond these days, although the delay is not attributable to his fault, "as he has engaged that the work shall be done within the time:" Abbott on Shipping, 11th edition, p. 68. Where, however, the charter party is silent as to the time to be occupied in the discharge, the contract implied by law is that each party will use due diligence in performing the part of the duty which, by the custom of the port, falls upon him; and there is no implied contract that the discharge shall be performed in the time usually taken at the port: *Ford v. Coatsworth*, L. R. 4 Q. B. 127.

The contract thus implied is between the shipper and the owner of the vessel; the consignee, as such, is not a party to it or liable to an action for a breach of it: *Kemp v. McDougall*, 23 U. C. R. 380; *Burnet v. Conger*, 23 C. P. 590. And the Ontario Act, 33 Vict. cap. 19, now R. S. of O. cap. 116, sec. 5 (which is a transcript of the Imperial Act 18 and 19

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Vict. cap. 111), makes no difference in this respect, as it does not apply where nothing is said in the bill of lading as to demurrage: *MacLachlan on Merchant Shipping*, 2nd Ed. p. 490. Where the defendant is in effect both consignor and consignee, he is liable, of course, in the former capacity. In *Barker v. Torrance*, 30 U. C. R. 43, affirmed on appeal, vol. 31, p. 561, the defendants were the consignors on the bill of lading—the apparent consignees being other parties, and it was held that there was evidence that the defendants were, in effect the consignors and they were held liable for unreasonable delay in unloading.

In the present case the apparent consignors are Martin & Co., and there is nothing on the face of the bill of lading to show that they acted as agents (as was the case in *Barker v. Torrance*), no objection was, however, taken to maintaining the action on the ground that the defendant was not the consignor, and, although he was called on his own behalf, he was not questioned on this point. He did, however, say that he had been compelled by the vendors of the coal to pay for the full amount covered by the bill of lading, and he produced the correspondence on the subject, which was not with Martin & Co., but other persons. This correspondence was not put in, being objected to by plaintiff's counsel. As the case stands, I can properly assume that the defendant was the real consignor and that Martin & Co. were his agents. The defendant in this case was the defendant in *Burnet v. Conger*, above mentioned, where this objection was successfully made, and his silence here is very significant.

The remaining and important question is whether there is evidence of negligence.

In *Kemp v. McDougall*, 23 U. C. R. at page 386, the present Chief Justice of the Court of Queen's Bench while agreeing that the rule for non-suit or new trial should be discharged, says that he wishes to lay down no rule as to the obligation of a shipper to guarantee the non-detention of the vessel by the want of readiness to receive. He points out that in the case of a general ship "no such obligation exists, as the carrier can always discharge his duty by unloading at an ordinary wharf or storehouse." He says also that the books are singularly barren of authority except in cases of regular charter party. In *Ford v. Cotesworth*, L. R. 4 A. B. 127 (referred to with approval by Hargarty, C. J., in *Burnet v. Conger*, 23 C. P. at page 595), the rule of law governing cases like the present is laid down by Blackburn, J., in the way I have already quoted, viz.: that the merchant and ship-owner should each use reasonable despatch in performing his part.

In the present case the coal was consigned to P. D. Conger, Kingston, Ont., for the asylum. The freight was to be \$1.20 a ton, "free in and out." The meaning of the last words was conceded to be that the coal was to be loaded and unloaded by the consignor and consignee. The master and crew had only to take the vessel to its destination. This was done, and it was found that the vessel could not be unloaded, owing to the only place for unloading at being occupied by another vessel of the defendant's, which had arrived first and was being unloaded. The whole delay was occasioned by this—the defendant did not provide nor suggest (nor did the authorities at the asylum) any other mode of unloading, nor was it contended that any other mode could have been adopted. If the plaintiffs were compelled to wait until this vessel was unloaded, why should they not be compelled to wait for a dozen, if they happened to be there? It cannot be said that the delay was occasioned by any act of the plaintiff; it was entirely the act of the defendants. It was not even occasioned by any pressure of business generally. It is laid down by MacLachlan, at page 488, that under the implied contract the ship-owner is liable in damage for detention, notwithstanding it is occasioned by the crowded state of the docks. The cases, however, cited in support seem all to be cases in which a number of days were fixed by the charter party. In the present case, however, I think that the defendant is responsible for the delay. He was sending the coal to a particular place, where the means of unloading were limited. He assumed the responsibility of unloading, and he delayed it by his own act. As to the measure of damage: the plaintiff received \$268.80 freight, on a voyage lasting nine days (including the time occupied by unloading, and allowing two days for unloading); the expenses of passing through the canal came to about \$60 and towage \$4. During most of the trips made by the *Mary* in 1883 she went up the lakes light, although there is evidence that on this trip she had a chance of a cargo. On the whole case, I think \$20 a day for seven days a reasonable allowance—making in all \$140.

Sundays seem to be allowed in demurrage unless there is a custom in the port to the contrary: *Abbott on Shipping*, 11th edition, p. 266. The defendant counter-claims for a shortage in the cargo alleging that while the bill of lading is for 234 tons and admits the receipt of that quantity, only 223 tons and 1,800 lbs. were delivered.

The bill of lading is that the defendant contends for 234 tons, and the evidence shews that only 223 tons and 1,800 lbs. were delivered. The statute R. S. of Ont. cap. 116, sec. 5, sub-sec. 3, makes a

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CONLON ET AL. V. CONGER—RECENT ENGLISH PRACTICE CASES.

bill of lading conclusive evidence of shipment in the hands of a consignee, or endorsee for valuable consideration as against the master signing it, but as between the shipper and owner it is not conclusive evidence in respect of quantity: *Allen v. Chisholm*, 33 U. C. R. at page 244—it is, however, *prima facie* evidence against the owner: *McLean v. Fleming*, L. R. 2 App. 128 cited in *Merton v. Kingston and Montreal T. Co.*, 32 C. P. at page 373.

In the present case the coal was received on the vessel at Cleveland through shoots from railway cars. The captain swears it was not weighed at the time of loading. He swears that none of it was removed on the voyage (and he is corroborated on this point by one of the crew who was called) and that it was delivered in the same condition as he received it except a small quantity of the deck coal which was washed off by the waves. There is nothing to contradict this evidence except the bill of lading, and I do not see any reason for disbelieving it. The plaintiffs endeavoured to prove a custom that ship-owners were not held responsible for shortage in cargoes of coal, but that freight was only payable in respect of the quantity delivered. I do not think the evidence established the existence of the custom claimed as to the non-liability for shortage, nor do I think such a custom could be established by law. The simple question is: What quantity of coal was shipped? That quantity must be accounted for unless the loss is excused by reason of something excepted on the bill of lading. The freight is only paid (as a general rule) on the quantity delivered because that is the quantity carried.

In the present case any loss that is admitted was of part of the deck load. The bill of lading provides "all property on deck at the risk of the vessel and owners." The words "owners" in a bill of lading stating "deck-load at risk of owners" means the owners of the goods, not the owners of the vessel: *Merrit v. Ives et al.*, M. T. 4 Vict. The phrase used in the present bill can only mean at the joint risk of the owners of the vessel and of the goods, per Harrison, C. J., in *Spooner v. Western Assurance Co.*, 38 U. C. R. page 72. Under such a provision, in case of a jettison of the deck load, such jettison is replaced by contribution between the owner of the deck-load and the owner of the vessel (same case at page 70), but I do not see that it affects the liability for loss as between those parties from the ordinary work of the waves. It was said by one of the defendants' witnesses that where shortage happened to a deck load it was at the owner's risk and the ship-owner would lose his freight. I think a loss of this kind must be within the clause as to

danger of navigation and that the vessel owner is not responsible.

My judgment, therefore, is that the plaintiffs are entitled on their statement of claim, the same being amended as already indicated, to damages to the amount of \$140, being \$100 more than the amount paid into court, and I direct that judgment be entered for the plaintiffs for the sum of \$100 with full costs, and I direct that on the counter claim judgment be entered for the defendants thereon (the plaintiffs in the original suit), with full costs, but I stay the entry of such judgment until the 9th January next.

## RECENT ENGLISH PRACTICE CASES.

### HILL V. HART-DAVIS.

*Imp.* (1883) O. 38, r. 11—O. 65, r. 27, ss. 20—Ont. Rule 435—Chy. Ord. 69.

#### *Affidavits—Prolixity—Costs.*

Although there is no rule of Court specially giving power to the Court to take pleadings or affidavits off the file for prolixity, yet the Court has an inherent power to do so in order to prevent its records from being made the instrument of oppression. Where, however, an affidavit was of oppressive length, but it appeared to the Court that delay and expense would be caused by filing a fresh one, the Court permitted it to remain on the file, but ordered the party filing to pay the costs of it.

[L. R. 26 Ch. D. 470, C. A.]

The affidavit in question was an affidavit on production, in which the documents, instead of being referred to in bundles, and scheduled and numbered, were set out in detail.

It was stated in the course of the argument that when a document is ordered to be taken off the file, the practice is not to return it to the party who placed it there, but to destroy it by burning.

COTTON, L.J.—"Although the rules contain no provision for taking a document off the files for prolixity, yet it is the duty of the Court to see that its files are not made the instruments of oppression, and that without any provision in the rules the Court has power, and it is its duty to order oppressive documents to be taken off the file, even though this should result in their being burnt."

### COLES V. CIVIL SERVICE SUPPLY ASSOCIATION.

*Imp.* (1883), O. 16, rr. 48, 52—Ont. Rules 107, 108, 110, 111.

#### *Third party procedure—Indemnity over—Form of order.*

[L. R. 26 Ch. D. 529.]

Where in an action for damages in respect of alleged injury to the plaintiff's premises, the de-

## RECENT ENGLISH PRACTICE CASES.

fendant claiming to be entitled to indemnity over against a person not a party to the action, had served such person with a third party notice under Order 16, r. 48 (see Ont. R. 107, 108), and he had appeared thereto, the Court upon a summons for directions taken out by the defendant (see Ont. R. 111) give the third party, who did not admit his liability, liberty to appear at the trial of the action and take such part as the judge should direct, and be bound by the result, and ordered the question of his liability to indemnify the defendant to be tried at the trial of the action, but subsequent thereto.

In case a third party appears and admits his liability to indemnify, the Court will give him leave to defend the action.

## SALM KYRBURG V. POSNANSKI.

*Imp.* (1883) O. 44, r. 2—*Ont. Rules* 357, 364, 365.

A judge at Chambers has power to order the issue of a writ of attachment for disobedience of an order of a judge at Chambers.

It is not necessary to make a judge's order a rule of Court as a preliminary to taking proceedings to enforce it.

[L. R. 13 Q. B. D. 211.

HUDDLESTON, B.—"It is contended that such obedience can only be enforced by proceeding according to the old practice, viz., by making the order a rule of Court, and by applying to the Court for an attachment for contempt of Court in disobeying the rule of Court."

Order 44, r. 2, enacts that no attachment shall issue without the leave of the Court, or a judge (see Ont. Rule 365). "Now, by the terms of s. 39, (see R. S. O., c. 39, ss. 20, 21), already alluded to 'any judge sitting in Court shall be deemed to constitute a Court.' Therefore the case of a single judge sitting in Court is included under the term 'Court' and 'judge,' can only mean a judge sitting at Chambers."

## JONES V. CURLING.

*Imp.* (1883) O. 65, r. 1—*Ont. Rule* 428.

*Costs—Action tried by jury—"Good cause," for not allowing costs to follow event—Appeal.*

Where an action is tried by a jury the presiding judge has no jurisdiction under O. 65, r. 1 (Ont. Rule 428), to make an order by which the costs will not follow the event, unless there exist "good cause" within the meaning of that Rule, and consequently there is an appeal with respect to the existence of the facts necessary to give the judge jurisdiction to make such order.

"Good cause" within that Rule is the existence of facts showing that it would be more just not to allow the costs to follow the event, e.g., oppression or misconduct of the successful party whereby costs have been increased unnecessarily.

The fact that an action is for the recovery of several closes of land, that the only defence is that the defendant is in possession, and that the plaintiff only succeeded as to some of the closes, does not constitute "good cause" within O. 65, r. 1 (Ont. Rule 428), since the verdict in such a case is distributive, and the costs would be taxed as upon a finding by the jury on separate issues.

[L. R. 13 Q. B. D. 262.

FRY, L.J., observed "the general scheme of Order 65, r. 1, is this: it places all costs in the discretion of the Court, but upon this there is an exception, namely, where there is trial by jury, and upon that there is a further exception, which brings the costs back within the discretion of the judge, namely, where there is "good cause." Now it appears to me whether the facts exist which give the judge the discretion must be the subject of appeal. It is not withdrawn from appeal because the discretion of it exist, is not the subject matter of appeal. . . . Now, in the present case what is there which can be called "good cause?" The plaintiff succeeded in recovering some closes, and failed with regard to other closes. The event in this case is a distributable event. The very form of the judgment shows that it is so, for it shows that the plaintiff only recovers certain of the closes, and it shows with equal distinctness that he fails to recover the others. Therefore, whether one looks at the form of the verdict or of the judgment, it is distributive, and the event with which it deals is not a single one. That being the case, I think that upon taxation the costs would follow those distinct issues. Is then the fact of the success of the plaintiff on some issues, and of his failure on other issues, by itself "good cause" for interfering with the rule that the costs follow the event? I am bound to say that it appears to me not to be so?"

BRETT, M. R., quoted with approval the *dictum* of the late Sir Geo. Jessel in *Cooper v. Whittingham*, 15 Ch. D., at p. 504: "As I understand the law as to costs it is this, that when a plaintiff comes to enforce a legal right, and there has been no misconduct on his part, no omission or neglect, which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts. For instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind the rule is plain and well settled, and is as I have stated." This, he thought, though not said with reference to O. 65, r. 1, serves nevertheless as a good indication of what is meant by "good cause" in that rule.

See *Walmsley v. Mitchell*, 5 O. R. 427.

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NOTES OF CANADIAN CASES.

[Q. B. Div.]

## GRANT V. EASTON.

*Imp.* (1883), O. 3, r. 6—O. 14—*Ont. Rules* 14, 80.*Foreign judgment—Writ specially indorsed—Leave to enter final judgment.*

In an action on a foreign judgment in which the writ of summons has been specially indorsed, the plaintiff may obtain an order empowering him to sign final judgment.

[L. R. 13 Q. B. D. 302.]

BRETT, M. R.—"An action upon a foreign judgment may be treated as an action in either debt or assumpsit, the liability of the defendant arises upon the implied contract to pay the amount of the foreign judgment."

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

## QUEEN'S BENCH DIVISION.

## MARA V. COX ET AL.

*Broker—Pledge of Stock—Sale by Pledge.*

Plaintiff, a broker, pledged stock with defendants, brokers, for advances, plaintiff's object being to buy stock largely and hold it for a rise in the market, and it was agreed that if plaintiff was in default for interest, or in keeping up margins, defendants could sell stock on two days' notice. Defendants being in need of the stock used it. Subsequently defendants alleged plaintiff was in default, and plaintiff being ignorant of the disposition of his stock gave defendants his notes for amount claimed by them, and afterwards ascertained that his stock had been sold. Defendants pleaded the custom of brokers as to their right to sell the stock. *Held*, custom not proved, nor would it be valid. That the parties might agree to be bound by such a manner of dealing, but in this case no such agreement was proved. *Held*, also, that defendants might lawfully have repledged to enable them to raise their advances to plaintiff, but that the sale and other disposition by them without notice to plaintiff, and without default on his part, were

wrongful, and entitled plaintiff to recover the prices at which defendants sold the stock.

*Osler*, Q. C., and *Nesbitt*, for plaintiff.*S. H. Blake*, Q. C., and *Kerr*, Q. C., contra.

Rose, J.]

## SLATER V. ANTHONY.

*Sheriff—Interpleader—Abandonment—Attachment.*

Under *fi. fa.* in *McLean v. Anthony*, the sheriff, on 17th April, 1883, having seized defendant's goods, sold same to Ferguson, rent being then overdue to landlord. Ferguson did not remove goods, but by agreement between sheriff, landlord and Ferguson, latter retained enough to pay rent. Ferguson then sold goods to E., who was to pay rent, with a further amount which subsequently accrued. Defendant then surrendered term and E. became tenant. On 23rd April, *fi. fa.* in *Slater v. Anthony* being placed in sheriff's hands, he seized same goods between 21st May and 23rd June, E. claiming goods, sheriff interpleaded, the result of which was in Slater's favour. Pending interpleader, sheriff allowed landlord's bailiff, who also claimed goods for taxes, to sell them and pay rent and taxes. It turned out that sheriff took no security for goods, and E. was worthless.

*Held*, sheriff liable to attachment on motion of execution creditor.

## \*BROWN V. NELSON.

*Contract—Part performance—Rescission.*

Plaintiff agreed to buy from defendant seventy-six shares of a certain company's stock, held by him as representing one B.'s estate, plaintiff giving his note to defendant for the amount of the shares, and at his request pledging the shares with forty-four others to a bank note, discounted the note. Defendant, who controlled the company, was to retain plaintiff as managing director of the company at a fixed stipend. Defendant retired the note when due and took an assignment of the stock. Plaintiff, being dismissed from his position, sued for a return of the forty-four shares, as the object of the pledging of them had been attained, and a return of the note, and to be relieved of the purchase of the seventy-six shares, as the condition of the purchase (his being kept in office) had been broken.

[Prac.]

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[Prac.]

*Held*, there being a part performance of defendant's agreement by retaining plaintiff for a time, there could be no rescission of the whole contract, that plaintiff was entitled to a return of his shares, defendant to judgment for the value of the seventy-six shares, and plaintiff must sue in a separate action for the dismissal.

*Osler, Q.C., and Nesbitt, for plaintiff.*

*Robinson, Q.C., and Biggar, contra.*

#### PRACTICE.

Mr. Dalton, Q.C.] [April 30.

WELLER V. PROCTOR.

*Notice of trial.*

On the 24th of April the plaintiff filed and delivered a reply with two paragraphs, in the first of which he denied directly certain allegations in the fourth paragraph of the statement of defence, and in the second he joined issue upon the balance of the defence. Notice of trial was served same day.

*Aylesworth*, now moved on notice to set aside the notice of trial on the ground of irregularity in that the same was given prematurely before the pleadings in the action were closed.

*Holman*, contra, contended that it was not negatived in the affidavit filed in support of the motion that no joinder was filed when notice of trial given; that so far as the affidavit showed a joinder might have been put in by the defendant on the 24th of April, and that the first paragraph of the reply was equivalent to a joinder of issue in that it was a simple denial of an allegation in the Statement of Defence.

The MASTER IN CHAMBERS held that the material filed was insufficient to support the motion, and while expressing opinion that the joinder of issue referred to in Rule 176 O. J. A., was the well recognized form of joinder of issue and not simply a denial of a previous pleading, dismissed the motion without costs.

Proudfoot, J.] [Sept. 22.

RINGROSE V. RINGROSE.

*Costs—Action for alimony—R.S.O. c. 40, sec. 48.*

Pending an action for alimony, and before trial, the plaintiff returned to live with the defendant.

*Held*, that an order for the payment by the defendant of the costs of the plaintiff's solicitors should be restricted to the cash disbursements of the solicitors.

*Leonard v. Leonard*, 9 P. R. 450, *Moore v. Moore*, 4 C. L. T., overruled.

*Elgin Myers*, for the defendant.

*W. H. P. Clement*, for the plaintiff's solicitors.

Osler, J. A.] [Sept. 23.

McLAUGHLIN V. MOORE.

*Examination of parties—Action for breach of promise—45 Vict. c. 10, sec. 3 (O).*

*Held*, that since 45 Vict. c. 10, sec. 3 (O), the parties to an action for breach of promise of marriage are both competent and compellable witnesses.

*Aylesworth*, for the defendant.

*W. H. P. Clement*, for the plaintiff.

Mr. Dalton, Q.C.] [Sept. 26.

McLAREN V. CANADA CENTRAL RAILWAY.

*Judgment—Interest—Rule 326, O. J. A.*

On the 23rd day of January, 1882, judgment was pronounced in Court by Osler, J., in the following words:—

"I direct judgment to be entered for the plaintiff against the within named defendants, after the 5th day of next Hilary Sittings, for \$100,000."

Judgment was formally entered with the Clerk of the Court upon the 24th day of March, 1882, but was dated as of the 23rd day of January, 1882.

Upon a special case submitted for the decision of the Master in Chambers as to whether interest was to be computed from the 23rd January or the 24th March.

*Held*, that Rule 326, O. J. A. does not apply where, as in this case, the judgment itself regulates the entry, and interest must be computed from the time of the actual entry of the judgment. *Kelcher v. McGibbon*, 10 P. R. 89, distinguished. The judgment was amended by causing it to bear date on the day of the actual entry.

*W. H. P. Clement*, for the plaintiff.

*A. H. Marsh*, for the defendants.

Prac.]

NOTES OF CANADIAN CASES.—BOOK REVIEWS.

Mr. Dalton, Q.C.].

[Sept. 30.]

CRANDELL V. CRANDELL.

*Alimony—Costs against plaintiff.*

The plaintiff, in an alimony suit, registered a certificate of *lis pendens* against the lands of the defendant.

Upon the defendant's motion to discharge the *lis pendens*.

The MASTER IN CHAMBERS made the order with costs against the plaintiff to be deducted from the payments (if any) for *interim* alimony.

*Smoke*, for the defendant.

*Hoyles*, for the plaintiff.

Rose, J.]

FREEMAN V. ONTARIO AND QUEBEC RAILWAY.

*Award—Execution by Arbitrators.*

This was a motion for an order directing payment out of Courts of moneys deposited there in proceedings under the Consolidated Railway Act, 1879, 42 Vict. ch. 9.

The defendants opposed the motion on the ground that award was invalid, having been signed by two of the arbitrators without notice to the third as required by sec. 9, sub-sec. 17 of the Act.

*C. H. Ritchie*, for the plaintiff.

*H. Cameron*, Q.C., for the defendants.

Rose, J., after discussing the evidence adduced held that the award in this case was made at a meeting held at a time and place to which a meeting at which the third arbitrator was present, had been adjourned, and therefore the statute had been complied with. He referred to *In re Templeman v. Read*, 9 Dowl, 964, where Coleridge, J., states the law thus: "The principle on which this case must be decided is quite clear; the parties are desirous of having their disputes settled by a unanimous award of three, and no award of two can be good until the third has had a full opportunity of joining in it, and has declared his dissent from it, or withdrawn him from the reference.

. . . Courts of law will always construe awards and bear motions respecting them, with a desire to sustain the judgment of the tribunal which the parties have selected," and concluded as follows: I think acting upon such rule and no case having been found going the length I am asked to go and believing that

Mr. Kingsmill had full opportunity of joining in the award, and did declare his dissent from it and withdraw from the reference. Remembering that he received his fees without protest against the action of his brother arbitrators; that the Company made a motion against the award without raising this point, although a perusal of the facts in the Norval case could hardly fail to suggest it. I am convinced that the objection is an afterthought and should not be received with favour. I will leave it to a higher Court, to lay down a rule of law (if one is to be laid down on facts such as these) which will deprive this claimant of her award. I cannot assume the responsibility. The order will be made absolute with costs.

## BOOK REVIEWS.

A LAW TREATISE ON THE CONSTITUTIONAL POWERS OF PARLIAMENT AND OF LOCAL LEGISLATURES, UNDER THE BRITISH NORTH AMERICA ACT, 1867. By J. Travis, Esq., LL.B., of the New Brunswick Bar. St. John, New Brunswick: Sun Publishing Co'y, 1884.

THE author on his title page makes no display of modesty, for he there sets out a long train of personal dignities or titles which, if attached to an ordinary lawyer, would necessitate the employment of a train-bearer. Inside the cover of the book may be discovered a mass of printing liberally interspersed with small capitals, italics, notes of admiration, and other modes of emphatic appeal to a careless reader's attention. Of calm or lucid argument there is little; of vigorous vulgarity, interspersed with sundry bursts of sarcasm, there is abundance, which, with venturesome vehemence, the author hurls against what he is pleased to call "pretentious and utterly absurd" arguments. In one place he struggles with the "crude absurdities" of a certain author, and though he tells us he does not wish "to take up time and space with any further consideration of that dreadfully weak publication," yet he devotes several pages to a consideration of its arguments, and finally annihilates the author with a sneer.

Taking an introductory sample of his style of criticism, we find on page 114 a reference to a rule of construction which the author says has been persistently denied or misunderstood "by judges who, though overflowing with pretension, are so ignorant of law that of one of the most ignorant and pretentious of them it is said (on the authority

## BOOK REVIEWS.

of one of his most equally ignorant and still more pretentious brother-judges), that he made the humiliating confession *that he had never read but one law book in his life*—Selwyn's *Nisi Prius*."

Coming to details, he charges Mr. Justice Fisher with "misquoting the language of the B. N. A. Act;" Mr. Justice Henry with "leaving out of sight the very essence of the clause—playing Hamlet with the part of Hamlet omitted;" Mr. Justice Wetmore with giving "an absurd dissenting judgment." He also gives it as his opinion that in a certain dissenting judgment of Chief Justice Allen "there is a great amount of stilted nonsense;" that Mr. Justice Gwynne's "unsound rule—as it is claimed that it is—leads him astray;" that Mr. Justice Strong "contravenes the express language of the Act and the rule of construction there given," and "furnishes a rule as bad as are those of Mr. Loranger;" that "the judgments of Weldon, Fisher and Wetmore, JJ., were probably the most ridiculous of all the judgments that have yet been delivered on the *ultra vires* question;" that Mr. Justice Palmer "delivered a dissenting judgment which is very loosely reasoned, rambling and incoherent;" and that he "ridicules one of his brother-judges."

The character of the book may be gathered from the above, for we have neither patience nor space for further investigations. But our review would not be complete without two choice criticisms of the Judicial Committee of the Privy Council, which we give *verbatim* as follows:

"It is almost painful (a kind of—as Byron would call it—pleasing pain), in the excessively ridiculous aspect in which their views are presented, to follow them further. Their ignorance (to be perfectly candid and strictly just), actual, stupid, stolid ignorance of the matter they are examining, when we consider that *that* is our highest authoritative Appellate Court, is positively painful."

"It will scarcely be credited that the Privy Council were so utterly ignorant as so many children—but credited or not, astounding as the fact was even to ourselves, when it was forced upon our minds."

A man of "many minds." And by such arguments the author proposes to teach the public what are the Constitutional powers of Parliament and of the Local Legislatures!

THE NATURALIZATION ACT, CANADA, 1881, with Notes, Forms, Table of Fees, etc. Appendix containing Treaty, etc., also Naturalization Laws of United States, with forms, etc. By Alfred Howell, of Osgoode Hall, Barrister-at-Law, author of "Surrogate Courts Practice:" Carswell & Co., publishers, Toronto.

The new law establishing a uniform system of naturalization for the whole Dominion, which recently came into operation, is one of very great importance, and is of interest not only to the legal

profession, Clerks of Courts, Registrars, and Justices of the Peace, but to the whole foreign population of the country which, already large, is being increased by many thousands each year. The law covers not only the common naturalization, but the whole question of the nationality of Canadians as well as British subjects and of foreigners within our boundaries. It defines the national character of married women, widows and minors; and it places aliens on the same footing in Canada in holding and disposing of real and personal property as British subjects. The principle enunciated by Lord Chief Justice Cockburn, that—"it should be free to every one to expatriate and denationalize himself, and to transfer his allegiance to another country"—is embodied in it. The Act could not be understood or put into full practical operation unless read side by side with orders-in-council and other State papers referred to in it. In the treatise before us these have been collected, and with Mr. Howell's annotations and a disquisition on the old rule of perpetual allegiance in the United Kingdom, Canada, and the United States, form a complete exposition, in a condensed form, of the law upon the subject. Those desirous of using the United States law and forms or comparing it with the Canadian, will find the former set forth in the Appendix.

Mr. Howell appears to have done his work well and carefully. We have already commended this little work to the profession.

A MANUAL containing a Short Summary of the usual Practice and manner of Proceeding in Ordinary Cases coming under the observation of Justices of the Peace, Coroners, Constables, Landlords, Bailiffs, etc., and also containing a large amount of useful information for Farmers, Mechanics, Business men, and the Public generally, by Edward Norman Lewis, Barrister-at-Law. Toronto: Carswell & Company.

In this little book which has been "carefully revised" by Judges Toms and Doyle, of County of Huron, we have much information very useful to many classes of persons. After a few preliminary pages devoted to the practice before Justices of the Peace, the author proceeds to set out in alphabetical order a list of indictable and summary cases. Then follows Chapter IV., devoted to the subject of Coroners, and Chapter V. on Constables. Chapter VI. gives elementary information on such subjects as Registration of Births, Deaths and Marriages; Mechanics' Liens, Mills' Act, Line Fence Act, Estray Animals, Leases and Rent, and the Ditches and Watercourse Act. Many forms are given. Speaking generally the book will be found to contain a great deal of information, handily arranged. It is a pity that the author has not in all cases referred to his authority.

## LAW STUDENTS' DEPARTMENT.

## LAW STUDENTS' DEPARTMENT.

## LAW SOCIETY EXAMINATION QUESTIONS

## TRINITY TERM :

## FIRST INTERMEDIATE.

*Anson on Contracts and Statutes.*

1. Define *escrow*, *merger*, *recognisance*.
2. "As a general rule it is optional to the parties to a contract to employ or not to employ the form of a deed." State *common law* exceptions to this.
3. Define and illustrate by an example of each *executory executed* and *past* considerations.
4. Give examples of agreements void under the rules of the common law as distinguished from statutory prohibition.
5. Write short notes on the assignability of the *benefit* of a contract.
6. Point out the requirements for a tender of money to be an answer to an action for a debt.
7. Mention the requirements of the Statute law in regard to parties to a Bill of Exchange writing their address after their names, and the consequence of neglect to do so.

*Honors.*

1. Give arguments for and against the assertion that agreement is not necessarily the basis of contract.
2. To what extent is the question of consideration in a contract by deed important in the discussion of the validity of the contract? Answer fully.
3. Write brief notes on the validity of contracts made with lunatics and persons in a state of intoxication.
4. Criticize the expression *legal fraud* as distinguished from *moral fraud*.
5. State accurately the effect of illegality of object between the original parties to the contract on a negotiable instrument in the hands of subsequent holders.
6. Point out cases in which extrinsic evidence affecting the terms of a contract is admissible.
7. What is the effect on an executed contract of sale of a chattel, when the article proves to be worthless and unmarketable? Answer fully.

*Smith's Common Law.*

1. Explain what is meant by *excessive distress*.
2. What is the chief difference between a *factor*, and a *broker*?
3. In an action for malicious prosecution may the jury infer (a) *malice* from *want of reasonable and probable cause*; (b) *want of reasonable and probable cause* from *malice*? Explain.
4. If a passenger take his baggage along with him in the passenger car, instead of having it put in the baggage car, what effect has that on the responsibility of the company therefor?
5. In the case of a vague imputation of dishonesty, what difference does it make, as to the liability of the person making it, whether it be oral or written?
6. What evidence is sufficient *prima facie* proof that a letter was duly received by the person to whom it was addressed?
7. A butcher's boy is sent with the butcher's horse and cart to deliver meat to a customer: after delivering the meat he drives a mile further on some business of his own and, while doing so, he negligently collides with a waggon on the road. Is the butcher liable for the damage done to the waggon? Give reasons.

*Real Property.*

1. Define estate *par autre vie*; *cestui que vie*; *freehold*; *grantee to uses*; *cestui que use*.
2. What is meant by consolidation of securities?
3. What is the difference in the mode of creating a remainder and a reversion?
4. What was the common mode of conveyance before the statute of uses was passed?
5. How was a feoffment without consideration construed in equity?
6. By what tenure are lands held in Ontario?
7. What is meant by a term of years?

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

EASTER TERM, 47 VICT., 1884.

During this term the following gentlemen were entered on the books of the Society as Students-at-Law:—

Graduates—C. I. T. Gould, S. C. Warner, W. T. Kerr, Ernest Heaton, F. M. Field, John A. Davidson, H. H. Langton.

Matriculants—A. A. McMurchy, J. F. Edgar, A. L. Baird, J. A. Macdonald.

Juniors—A. McDonell, J. G. Gauld, C. D. Scott, H. Scott, H. F. Errett, J. G. Kerr, T. Graham, W. J. McKay, H. Millar, W. B. Scane, D. T. K. McEwan, C. Pierson, E. M. Lake, R. M. Thompson.

The following gentlemen were called to the bar, namely:—

David K. I. McKinnon, honor man and gold medalist; Alexander Mills, honor man and bronze medalist; Alexander W. Ambrose, Alfred Craddock, Edmund Sweet, William J. Code, William A. Dowler, Andrew C. Muir, Edwin R. Reynolds, Thomas B. Shoebotham, Arthur W. Morphy, Charles H. Cline, John W. Russell, James W. Hanna, Robert N. Ball, Gerald Bolster, Robert Christie, William Cook, Robert A. Pringle, Jos. Walker.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- |                      |   |  |
|----------------------|---|--|
| 1884<br>and<br>1885. | { | Arithmetic.                                |
|                      |   | Euclid, Bb. I., II., and III.              |
|                      |   | English Grammar and Composition.           |
|                      |   | English History—Queen Anne to George III.  |
|                      |   | Modern Geography—North America and Europe. |
- Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

- |       |   |                                  |
|-------|---|----------------------------------|
| 1884. | { | Cicero, Cato Major.              |
|       |   | Virgil, Æneid, B. V., vv. 1-361. |
|       |   | Ovid, Fasti, B. I., vv. 1-300.   |
|       |   | Xenophon, Anabasis, B. II.       |
| 1885. | { | Homer, Iliad, B. IV.             |
|       |   | Xenophon, Anabasis, B. V.        |
|       |   | Homer, Iliad, B. IV.             |
|       |   | Cicero, Cato Major.              |
|       |   | Virgil, Æneid, B. I., vv. 1-304. |
|       | { | Ovid, Fasti, B. I., vv. 1-300.   |

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb, I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar.

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## or NATURAL PHILOSOPHY.

Books—Arnot's elements of Physics, and Somervilles Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

# Canada Law Journal.

VOL. XX.

OCTOBER 15, 1884.

No. 18.

## DIARY FOR OCTOBER.

13. Mon .....County Court and Surrogate Term, York. Battle of Queenston, 1812.  
18. Sat.....County Court and Surrogate Terms (York) end.  
19. Sun .....19th Sunday after Trinity.  
21. Tues.....Battle of Trafalgar, 1805.  
23. Thur.....Lord Monk, Governor-General, 1861.  
24. Fri.....Sir J. H. Craig, Governor-General, 1807.  
25. Sat .....Battle of Balaklava, 1854.  
26. Sun .....20th Sunday after Trinity.  
28. Tues.....Sittings of Supreme Court of Canada, Primary Examinations.  
31. Fri.....All Hallow Eve.

## TORONTO, OCTOBER 15, 1884.

THE new wing on the west side of Osgoode Hall is rapidly approaching completion. The accountant's department has already been transferred to the new building, and commodious offices assigned to it on the ground floor; and the Surrogate Clerk in Chancery has also taken possession of his new quarters. Between these offices two new rooms are allotted to the Clerk of the Process. In the upper story the new court room for the Chancery Division and the private rooms for the judges of that Division are being got into order. We believe, however, that it will be Christmas before the court room is ready for use, as the work of fitting it up with bench, seats, etc., yet remains to be done.

Osgoode Hall has always been somewhat of a puzzle to outsiders, and with this recent addition to its labyrinthine windings it will prove to be still more of a maze. The yawning chasm which heretofore separated Equity from Law, notwithstanding the Judicature Act, has happily been bridged over; and now that free access can be had between the judges of all the Divisions of the Supreme Court, the result will no doubt be seen in the increased facility which the learned judges will display in blending and harmonizing those formerly discordant elements.

A MOVEMENT is on foot in Victoria for the amalgamation of the two branches of the legal profession in that colony. The bar of Victoria seem disposed to resist the attempt, and have organized for the purpose of defending the exclusive privileges of their order. A committee has been appointed to inquire into the relations of the bar with solicitors, and the public. This committee has recommended that the etiquette of the bar should be reduced, as far as practicable, to a written code, and an organization adopted with the duty of watching over and enforcing the observance of the code, and it has also advised, and the bar has accepted the advice, and have resolved, as a sort of "sop to Cerberus," that a barrister may henceforth see his client personally, "advise him and earn a fee" without the intervention of a solicitor, provided no litigation has commenced. But that he may not write letters on the client's behalf, issue process, or effect the engrossing of deeds or other documents, or do any similar business. If our Australian cousins would be content to accept the advice of their professional brethren in this Province, we think that advice would be unanimous in favour of the modified form of amalgamation which has existed in this Province, almost from the very commencement of its legal history. The fact that a higher order of qualification is required of men who would aspire to the degree of barrister-at-law, than of those who merely wish to practise as solicitors is not lost sight of; and more stringent examinations are required for the former, than the latter class of practitioners. At the same time any one who wishes, and

## RECENT ENGLISH DECISIONS.

is able, may if he choose, pass both examinations and practise both branches of the profession. From an amalgamation, effected on this footing, we do not think the bar of Victoria would have anything to fear in the way of loss of emoluments. In this Province we have men who are both solicitors and barristers, and yet practise exclusively one or other branch of the profession. Usually the one who practises advocacy only, has associated with him partners who confine themselves to solicitor's work; and an eminent counsel is able indirectly to reap great benefit not only from his earnings as a counsel, but also from the solicitor's business which his prestige as a counsel naturally attracts to his firm.

## RECENT ENGLISH DECISIONS.

## ATTACHMENT OF DEBTS—ASSIGNMENT BY JUDGMENT DEBTOR.

The first case which we find in the August number of the Queen's Bench Division is that of *Vyse v. Brown*, 13 Q. B. D. 199. This was an unsuccessful attempt to reach a debt alleged to have been fraudulently assigned by the debtor, by means of the attachment of the debt. The debt in question was a legacy due from the garnishee as executor, which had been assigned by the debtor to the garnishee in trust for the benefit of the debtor's wife for life, and afterwards upon other trusts. The judgment creditor contended that the assignment was void. But Williams, J., remarked that even assuming the settlement to be impeachable, there was nothing in the nature of a debt, either legal or equitable, due or accruing due from the garnishee to the judgment debtor; as between these two, the settlement stands good and there was not the least ground for saying that the settlor could revoke the settlement, or call upon the garnishee to pay the money

over to him. "It was argued that the settlement must be treated as void and of no effect, and that consequently Brown (the garnishee), stood in the position of an executor, holding in hand a legacy due to the judgment debtor. There is, however, a fallacy in this argument; for, even supposing that the plaintiff had taken the proper steps to set aside the settlement as void, and had succeeded in doing so, even then Brown could never have been placed in the position of being obliged to pay over the money to Wise (the judgment debtor); the settlement would still be valid and subsisting between the parties; and although in such a suit Brown might be directed to pay over the whole, or a sufficient part of the settled fund to the creditor, that could never be by reason of his becoming indebted to the judgment debtor; the forms of decrees in such cases invariably exclude the settlor from all interest, and direct that any surplus of the fund shall follow the trusts of the settlement."

## COVENANT TO PAY RATES—WATER RATES PAYABLE TO WATER COMPANY.

The next case we come to is *The Direct Spanish Telegraph Co. v. Shepherd*, 13 Q. B. D. 202, a decision of a Divisional Court. In a lease of a shop and basement and of three rooms on the third floor of the same house, the lessor covenanted to pay "all rates and taxes chargeable in respect of the demised premises," and the question was, whether the charges for water supplied by a water company to the shop and basement, and paid for by the tenant, were within the term "rates," and it was held that they were, and that, therefore, the lessor was liable to repay the tenant the moneys so paid by him. Hawkins, J., "I am of opinion that it is such a rate, and was in the contemplation of the parties to the contract. The General Water Works Clauses Act was passed in the year 1847, and this lease was made long after—in the year 1883. The interpretation clause of

## RECENT ENGLISH DECISIONS.

the Act uses the expression, "water rate," which, it is declared, shall include any rent, or reward, or payment to be paid to the undertakers for the supply of water. In the 68th section we find that water rates are to be paid by, and be recoverable from the person receiving the supply of water, and shall be payable according to the annual value of the tenement supplied with water. These payments are thus brought within the terms of the covenant."

## SALE OF INTOXICATING LIQUOR TO DRUNKEN PERSON.

The next case to be noticed is one of some interest to temperance advocates, viz., *Cundy v. Le Cocq*, 13 Q. B. D. 207. The Licensing Act, 1872, Imp. 35 & 36 Vict. c. 94 sec. 13, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. A publican sold intoxicating liquor to a drunken person, who had given no indication of intoxication, and without being aware that the person so served was drunk. And it was held by Stephen and Mathew, JJ., that the prohibition was absolute, and that knowledge of the condition of the person served with the liquor was not necessary to constitute the offence, "the existence of a *bona fide* mistake as to the condition of the person served, is not an answer to the charge, but is matter only for the mitigation of the penalties that may be imposed."

## WILL, CONSTRUCTION OF.—BEQUEST OF INCOME OF ESTATE TO WIDOW.—DEBT DUE BY CHILD ENTITLED IN REMAINDER.—INTEREST ON SUCH DEBT PAYABLE TO WIDOW.

Passing over the next five cases, which are not of any special interest in this Province, we come to the case of *Limpus v. Arnold*, 13 Q. B. D. 246, a special case submitted for the construction of a will.

The testator had bequeathed the income of his estate to his widow for life and, thereafter, he devised and bequeathed all his property equally among his children. The will contained a proviso, that any advances made to any child, with interest on

such advances as charged against such child in his private memorandum book in his own handwriting, should be taken in full, or part, satisfaction of such child's share—one of the children had been advanced by way of loan £2,000 on which interest had been paid to the testator during his lifetime, and which was charged in the testator's memorandum book, which contained the following entry:—"This is the memorandum book named in my will as containing the advances made by me to my children, and their husbands, to be taken in satisfaction of their respective shares in my estate." The question submitted for the opinion of the Court (Stephen and Mathew, JJ.) was, Whether the widow was entitled to the interest on the debt of £2,000, or whether the interest ceased to be payable on the testator's death.

Stephen, J., said:—"To my mind the crucial question in this case is, Whether the clause relating to advances was meant to take effect at the death of the testator, or the death of the widow. Looking at the will as a whole, and considering the apparent intention that the widow should during her life take the income of the whole of the testator's property as he enjoyed it in his lifetime, and that there should be perfect equality between the children, it seems to me that the intention was that the interest on the sum due from the defendant should continue payable during the widow's life." Mathew, J. concurred.

## NEGLECTANCE—MASTER AND SERVANT—UNSAFE PREMISES.—KNOWLEDGE OF MASTER—IGNORANCE OF SERVANT.

The case to be next considered is a decision of the Court of Appeal affirming a judgment of the Queen's Bench Division, viz.: *Griffiths v. London and St. Katharines Docks Co.*, 13 Q. B. D. 259; in which the Court held that in an action by a servant against his master to recover damages for personal injuries resulting from the unsafe state of the premises on which the servant was employed—the

## RECENT ENGLISH DECISIONS.

statement of claim must allege not only that the master knew, but also that the servant was ignorant of the danger. "For the plaintiff it was contended that his knowledge was a mere matter of defence, and that it should so appear as a matter of pleading, but that is not true for the old form of declaration must have shown ignorance on the part of the servant."—Per Bowen, L.J.

## EASEMENT—STATUTE OF LIMITATIONS—WAY—USER AT LONG INTERVALS.

Passing over *Jones v. Curling and Grant v. Easton*, notes of which have appeared in our columns under the head of "Recent English Practice Cases," at p. 326, and also two other cases of no general interest, we come to *Hollins v. Verney*, 13 Q. B. D. 304. This was an action in which a right of way was claimed under the statute, in respect of twenty years user as of right. It appeared that the way had only been used by the party claiming it—the defendant—for the removal of wood from an adjoining close. The wood was cut upon this close at intervals of several years; the last cutting had been in the year before the action was commenced, the one previous, twelve years before, and the next at another interval of twelve years. Between these intervals the road was occasionally stopped up, but the defendant used it as often as he wished while the wood was being cut. The Court of Appeal now affirmed the decision of the Queen's Bench Divisional Court, holding that there had not been an uninterrupted enjoyment of the way for twenty years within the Prescription Act, which did not apply to so discontinuous an easement as that claimed. Lindley, L. J., who delivered the judgment of the Court, said: No user can be sufficient, which does not raise a reasonable inference of continuous enjoyment as of right, for the full period of twenty years before action. "Moreover, as the enjoyment which is pointed out by the statute

is an enjoyment which is open, as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term, (whether acts of user be proved in each year or not), the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted, if such right is not recognized, and if resistance to it is intended. Can an user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised, satisfy even this test? It seems to us it cannot: that it is not, and could not reasonably be treated as the assertion of a continuous right to enjoy; and where there is no assertion by conduct of a continuous right to enjoy, it appears to us there cannot be an actual enjoyment within the meaning of the statute."

## INCORPORATION OF TERMS OF CHARTER PARTY IN BILL OF LADING.

*Gullischen v. Stewart Brothers*, 13 Q. B. D. 317, was an appeal from the judgment of the Queen's Bench Division, 11 Q. B. D. 186. The question in dispute was the proper construction of a charter party and bill of lading. The charter party contained stipulations in the usual form for the payment of freight and demurrage, and also a stipulation that, "as this charter party is entered into by the charterers on account of another party, *their liability ceases* as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage." The charterers placed the cargo on board, and received a bill of lading, whereby the goods were made deliverable to themselves, "they paying freight and all other conditions as per charter party." The action was brought against them as consignees of the cargo, for demurrage in respect of delay at the port of discharge.

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The Queen's Bench Division held the plaintiffs entitled to succeed, and the Court of Appeal affirmed the decision.

## RAILWAY COMPANY—PROPERTY PROTECTED FROM EXECUTION.

In the *Great Northern Railway Co. v. Tahourdin*, 13 Q. B. D. 320, the Court of Appeal held that the protection against seizure in execution afforded by the Imperial Railway Companies' Act, 1867, ss. 3, 4, applies to railway plant of every company constituted by statute for the purpose of constructing or working a railway, even although the railway is merely a subordinate and ancillary part of the undertaking authorized by the statute.

## BURNING DEAD BODY, TO PREVENT INQUEST.

The Crown case of *Queen v. Stephenson*, 13 Q. B. D. 331, is deserving of notice. One of the prisoners had given birth to a child, which subsequently died under circumstances giving rise to suspicion, justifying the holding of an inquest, of the intention to hold which, the prisoners were notified; and they thereafter surreptitiously removed the body and burnt it. The prisoners were found guilty of a misdemeanor, and the Court now affirmed the conviction.

## WILL OF ALIEN—MODE OF EXECUTION.

The only case in the August number of the Probate Division which seems worth referring to is that of *Bloxam v. Favre*, 9 P. D. 130, in which the validity of a will made by an alien came in question. By the Imperial Naturalization Act, 1870, s. 2., it is provided that:—"Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural born British subject." By Imperial Act, 24 & 25 Vict. c. 114:—"Every will made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or

at the time of his or her death,) shall as regards personal estate be held to be well executed for the purpose of being admitted in England to probate, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin."

The will in question was made abroad by an alien, and executed according to the forms required by English law, but not in the manner required by the law of the country of the testatrix's domicile. Her domicile of origin was English.

Cotton, L.J., said:—"The object of the Act of 1870 was to remove disabilities of aliens with regard to real property. According to the common law they could acquire property in England by purchase, but could not hold it against the Crown. The present Act enables them to hold it against the Crown, and to dispose of it. The words "in the same manner in all respects as by a natural born British subject" occasion some difficulty, but looking at the object of the Act, I think we ought not to construe them as intended to confer upon aliens particular privileges given by a former statute to British subjects." The judgment of Hannen, P.P.D., was affirmed.

The September numbers of the *Law Reports* comprise 26 Ch. D. pp. 605-692; 13 Q. B. D. pp. 337-504, and 9 P. D. pp. 149-181.

## INTERPLEADER—SHERIFF'S FEE—POSSESSION MONEY.

The first case we propose to notice is that of *Smith v. Darlow*, 26 Ch. D. 605 C. A., in which two points of practice were decided by the Court of Appeal. The order appealed from was made upon an interpleader application by a sheriff. It barred the claimant, directed the pro-

## RECENT ENGLISH DECISIONS.

ceeds of the execution (which had been brought into Court and which were insufficient to satisfy the amount endorsed on the writ) to be paid the plaintiff, and ordered the claimant to pay the plaintiff's and sheriff's costs including the latter's possession money. From this order the sheriff appealed on the ground that his costs and possession money should have been ordered to be paid out of the fund in Court and that relief over should have been given to the execution creditor against the claimant for the amount so paid. The Court of Appeal gave effect to this contention holding that the C. L. P. Act, 1860 (Imp. St. 23 & 24 Vict. c. 126), s. 17, which enacts that "The judgment in any such action or issue as may be directed by the Court or judge in any interpleader proceedings, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them," did not render the order conclusive as against the sheriff, upon this point, however, Fry, L.J., dissented, and Bowen, L.J., doubted: but the Court was unanimous that the sheriff was entitled to be paid out of the fund, in priority to the execution creditor, his costs and possession money; and that the execution creditor should have relief over against the claimant, for the amount so paid the sheriff.

Cotton, L.J., thus stated the practice:—"We have consulted the other judges, and some of the officers of the Queen's Bench Division, and we find that they consider the rule to be, and we think it is a reasonable rule, that the sheriff is entitled to be made safe, that he has a right to say to the person who put him in motion:—"pay the amount of my proper charges." The strict form of order, therefore, would be when a claim by a third party fails that the charges should be paid in the first instance by the execution creditor to

the sheriff, and that the creditor should have them over against the third party."

ADVANCES TO COMPANY TO CREATE A FICTITIOUS CREDIT  
—FRAUDULENT AGREEMENT.

The next case to be here noticed is that of *In re Great Berlin Steamboat Company*, 26 Ch. D. 616, C. A., in which the Court of Appeal laid down the salutary rule that when a man places money in the hands of a company merely for the purpose of giving the company a fictitious credit in the eyes of third persons, as against the creditors of the company, he cannot, after a winding up order has been granted, claim the money as his own. The company in question appears to have been a "paper" company without any paid up capital, and the directors applied to the appellant Bowden to advance £1,000 to be placed to the credit of the company "for the purpose of having a creditable balance in case of inquiries from Berlin bankers, but not for the general purposes of the company; such money to be returned intact at the expiration of a month;" on these terms the money was advanced. Subsequently the appellant consented to payment out of the greater portion of the money for the purposes of the company, and only a balance of £99 15s. 0d. remained at the company's credit when an order to wind up the company was granted. Bowden claimed the £99 15s. 0d., but the Court of Appeal, affirming Bacon, V.C., held that he was not entitled thereto. Lindley, L.J., said:—"I am not satisfied that this was not a case of loan as distinguished from trust, and if that is the true view it is fatal to the appellant's case. But if it was a case of trust, the appellant must show what the trust was. He does so, and shews an illegal trust, since the purpose of the advance was to give a fictitious credit to the company." Baggallay and Lindley, L.L.J., were of opinion that when the purpose for which the money was advanced failed the appellant might

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at once have reclaimed the money, but Cotton, L.J., expressed no opinion on the point, but the Court was unanimous that after the winding up order all right of reclaiming the money was gone.

**COPYRIGHT—INFRINGEMENT—COPIES OF MATERIAL PORTIONS FOR PRIVATE DISTRIBUTION.**

In the case of *Ager v. Peninsular and Oriental Steam Navigation Co.* (26 Ch. D. 637), we have an important decision of Kay, J., on copyright law. The plaintiff published a collection of words suitable for being used in transmitting telegraphic messages in cypher, and for which he had a copyright. The defendants purchased a copy, and from it compiled for their own use, with its aid, a new and independent work, as alleged, which was their own private telegraph code; but instead of printing their code of signals, so far as it was original, separately as an adjunct to the plaintiff's book, they printed in their own book the bulk of the words from the plaintiff's book, appending to them numbers and meanings of their own, and distributed copies in their book among their agents at home and abroad, but had not printed their book for sale or exportation.

KAY, J. was clearly of opinion that what had been done by the defendants was an infringement of the plaintiff's rights. "To multiply copies of a material portion of a work which is entitled to copyright is as much a breach of the law, though differing in degree, as to multiply copies of the whole work, and it has long been settled that multiplying copies for private distribution among a limited class of persons is just as illegal as if it were done for the purposes of sale."

**ATTACHMENT FOR CONTEMPT OF COURT—RIGHT OF SHERIFF TO BREAK OPEN OUTER DOOR TO EXECUTE WRIT.**

In the case of *Harvey v. Harvey*, 26 Ch. D. 644, Chitty, J., was called upon to

determine whether, upon an attachment issued for contempt of court in not delivering deeds pursuant to the order of the court, a sheriff is bound to break open the outer door of the contemnor's residence, if necessary, for the purpose of executing the writ. The recalcitrant party in this case was a clergyman who had barred himself in his house and refused to allow any one to enter it. He had, moreover, written to a newspaper a letter in which he pretended to mistake the sheriff's officers for thieves or tramps, and with the object of deterring the officers from entering the house, he intimated that he was armed with a revolver. Under these circumstances the sheriff had failed to arrest the defendant, alleging that he was not entitled to break into the house for the purpose of his arrest. After an elaborate review of the authorities the learned judge arrived at the conclusion that although in the execution of merely civil process at the suit of a subject (such as a writ of *fieri facias*) the sheriff cannot break open outer doors, he can do so on a writ of attachment for a contempt of court of such a nature as the defendant had committed.

This case appears to create a doubt as to the right of a sheriff in this Province to break open an outer door in the execution of a writ of *habere facias possessionem* in the form given in the rules appended to the Judicature Act. (See Form No. 178.) The English form (See Imp. Rules, 1883, app. H. No. 8) has the words, "Therefore we command you that [you omit not by reason of any liberty of your country but that you] enter the same." It will be seen that the words in brackets are omitted from the form in use in this Province, and yet it would appear from *Harvey v. Harvey* that it is by virtue only of the *non omittas* clause in brackets that a sheriff is entitled to break open outer doors in the execution of such writs.

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WILL EXPRESSED IN TERMS OF FOREIGN LAW—  
CONSTRUCTION.

The case of *Bradford v. Young*, 26 Ch. D. 656, calls only for a brief notice. The will of (as the learned judge found) a domiciled Scotchman had been admitted to probate in England, and the question was whether it was to be construed according to English or Scotch law, and it was held by Pearson, J. that it must be construed according to Scotch law; and further, that the admission of the will to probate in England, was not conclusive that the testator was domiciled in England.

TENANT FOR LIFE AND REMAINDERMAN—SETTLEMENT  
BY WILL OF SHARE OF BUSINESS—LOSSES, HOW BORNE.

The next case we have to notice is that of *Gow v. Forster*, 26 Ch. D. 672, in which it was unsuccessfully argued that the principle laid down in *Upton v. Brown*, 26 Ch. D. 588 (noted *ante* p. 321) applied. The case arose under a will whereby the testator had devised all his real and personal estate, including his share in a business in which he was a partner, on trust as to one moiety thereof to pay the annual proceeds (including the net proceeds of the business) to his daughter for life, and after her death to her children, or remote issue. The will contained no provision as to how any loss in the business was to be borne, as between the persons interested in the testator's estate. It had, however, been the practice of the firm, during the testator's lifetime in prosperous years to divide the whole profit among the partners, and in years in which there was a loss to write off each partner's proportion of the loss from his share of the capital. After the testator's death the business was carried on for one year at a profit, and half the testator's share of that profit was paid to the daughter. For the following year there was a loss and the testator's share of the loss was written off from his share of the capital. For the next year there was a profit, and the question was:

Whether the half of these latter profits was to be paid to the daughter, or whether it must be first applied to make good the loss of capital of the previous year?

Pearson, J., was of opinion that the will indicated an intention on the part of the testator that the business should be carried on, after his death, in the same manner it had been carried on in his lifetime, and that therefore the profits in question were not to be applied to make good the losses of capital of the previous year, but that the daughter was entitled to be paid the full amount thereof.

MORTGAGE—PRIORITY—FUND IN COURT—STOP ORDER,  
FORECLOSURE—TIME FOR REDEMPTION.

The last case in the Chancery Division is that of *Mutual Life Assurance Society v. Langley*, 26 Ch. D. 686, in which a contest for priority arose between two incumbrancers under the following circumstances: L. being *cestui que trust* of a fund part of which was in Court and part in the hands of the trustees, assigned his interest by way of mortgage to C. L., who gave notice to the trustees, but did not obtain a stop order. L. executed a subsequent charge of his interest in favour of P. and M. (without notice of the mortgage to C. L.) P. and M. assigned to the plaintiffs, who obtained a stop-order—and it was held by Pearson, J., that C. L.'s notice to the trustees was ineffectual to bind the fund in Court, and that the plaintiffs who had obtained a stop order were entitled to priority.

In this Province the rule has been, we believe, almost invariable to give subsequent incumbrancers in foreclosure suits successive periods of redemption, but in some of the later English cases this practice has been departed from, and in the present case Pearson, J., remarked:—"My opinion is in favour of fixing, as a general rule, one period for redemption: the practice of giving successive periods has been found very inconvenient."

## RECENT ENGLISH DECISIONS.

CONTRACT—VENDOR AND PURCHASER—COMPENSATION FOR MISEDSCRIPTION IN ADVERTISEMENT—TAKING CONVEYANCE NO BAR TO RECOVERY.

The first case we have to consider in the Queen's Bench Division Reports for September is that of *Palmer v. Johnson*, 13 Q. B. D. 351, in which the Court of Appeal affirmed the principle, that where, in a contract of sale, there is an express condition for the allowance of compensation to the purchaser in case any error, mis-statement, or omission, be discovered in the particulars, the purchaser is entitled to enforce that condition, even after accepting a conveyance without covenants. This principle was laid down in *Cann v. Cann*, 3 Sim. 447, in 1830, and was followed about eighteen years ago by the Court of Exchequer in *Bos v. Helsham*, 2 Ex. 72; but Malins, V.-C., in the case *Manson v. Thacker*, 7 Ch. D. 620, came to a different conclusion, refusing to follow *Bos v. Helsham*, and held that after conveyance a claim for compensation for misdescription could not be enforced. But the Court of Appeal now declared that *Manson v. Thacker* was not law. Brett, M. R. put the judgment of the Court on this ground, viz., that "the contract is one which is daily contained in conditions of sale by auction, and when there is with respect to it the decision of such a case as *Bos v. Helsham*, which, having been on demurrer, could easily have been brought by appeal to the Exchequer Chamber, and ultimately to the House of Lords, and yet one finds it unchallenged until now, after a lapse of eighteen years, and when also one finds that it was preceded in 1830 by the case of *Cann v. Cann*, in which a deliberate statement of the law was made on which the case of *Bos v. Helsham* was founded, one cannot but say, that this Court, according to what has been a universal practice, even of a Court of Error, would decide now in the same way, even though it would not have come originally to the

same conclusion." Referring to the contrary judgments of Malins, V.-C., he observed, "A court of law is not justified, according to the comity of our courts, in over-ruling the decisions of another court of co-ordinate jurisdiction, and therefore the Vice-chancellor ought not to have differed from those former decisions." Speaking of the recent case of *Joliffe v. Baker*, 11 Q. B. D. 255, he said, "as to the elaborate judgment of Williams, J., in *Joliffe v. Baker*, if it conflicts with those two cases, viz., *Cann v. Cann* and *Bos v. Helsham*, I think, to the extent it so conflicts, it cannot be upheld."

The argument that the contract for compensation was merged in the conveyance was thus dealt with by Fry, L. J., in *Leggott v. Barrett*, 15 Ch. D. 309, 311: "Lord Justice James and the present Master of the Rolls laid down what is indubitably the law, that when a preliminary contract is afterwards reduced into a deed, and there is any difference between them, the mere contract is entirely governed by the deed, but that has no application here, for this contract for compensation was never reduced into a deed by the deed of conveyance. There was no merger, for the deed in this case was intended to cover only a portion of the ground covered by the contract of purchase."

This case therefore seems to proceed on the ground that the purchaser had a separate and independent contract for compensation which he was at liberty to enforce, because it was not merged in his deed of conveyance. But in the cases of *Besley v. Besley*, 9 Ch. D. 103, and *Allen v. Richardson*, 13 Ch. D. 524, which, equally with *Manson v. Thacker*, came under the condemnation of the Court of Appeal, there seems to have been no express contract for compensation, and it may be possible that on that ground those two cases may yet be maintained as good

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law in spite of the adverse comments passed on them in *Palmer v. Johnson*.

**BILL OF EXCHANGE — ACCEPTANCE BY DIRECTORS OF A COMPANY — PERSONAL LIABILITY.**

We have now to consider the case of *West London Commercial Bank v. Kitson*, 13 Q. B. D. 360, which involved the question as to whether certain directors of a joint stock company which had no power to accept bills, were personally liable on a bill of exchange payable to order and addressed to the company, and which had been accepted by the directors "for and on behalf of the company," and in which it was held by the Court of Appeal affirming the Divisional Court of the Queen's Bench Division (Day and Smith, JJ.) that this was a representation on the part of the directors: that the company had power to accept the bill, and as the company had not in fact such power, the directors who had, by their acceptance, made the representation, were personally liable. Fry, L.J., said:—"The defendants, by accepting this bill for and on behalf of the company, made a representation that the company had power to accept it. I think that was a representation of a matter of fact and not of law, because whether there was power or not depended on private Acts of Parliament. That representation was acted upon, as it was intended by the defendants it should be acted on. It was a false representation, and I have come to the conclusion that by reason of its having been made, and made falsely, the plaintiffs have sustained damages."

**INFANT—NECESSARIES.**

Passing over some intervening cases which have no special interest in this Province we come to the case of *Barnes & Co. v. Toye*, 13 Q. B. D. 410 in which the liability of an infant for necessities came up for consideration before a Divisional Court composed of Field, Manisty and

Lopes, JJ., and the Court held, that although the goods in question came under the class of necessities, yet it was open to the infant to show that he was already supplied with sufficient articles of the same class: in which case he would not be liable to the plaintiffs, no matter whether they were, or were not, ignorant of the fact when they furnished the goods. The decision of the Court of Exchequer in *Ryder v. Wombwell*, L. R. 3 Ex. 90, to the contrary, was therefore overruled.

The remaining cases reported in the Queen's Bench Division for September are of no special interest in this Province, being decisions for the most part under the English Bankruptcy Act.

**WILL—EVIDENCE OF DUE EXECUTION—ATTESTING WITNESSES.**

The only remaining case to be noticed here is that of *Wright v. Sanderson*, 9 P. D. 149, which is a decision of the Court of Appeal on a point of evidence. The testator in that case, in 1878, wrote a holograph codicil upon the same paper as a will which he had made and duly executed in 1868, and wrote at the end of it an attestation clause adapting that at the end of the will to the case of a codicil. He called the nurse into the schoolroom and asked her and the nursery governess to "sign this paper." There was evidence that he took his own pen into the room. Both witnesses signed. At the trial, which took place between four and five years after, the codicil was produced bearing the testator's signature, and both the attesting witnesses were examined. The governess deposed that she had designedly abstained from looking at any of the writing on the paper, and the nurse it appeared had been very nervous. Neither of them could say as to what writing was on the paper, nor as to whether the testator's signature was there when they signed, and both said that they did not see him sign. But, notwithstanding this evidence,

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it was held affirming the judgment of the very learned President of the Probate Division that the codicil was entitled to probate. Fry, L.J., succinctly states the grounds of the decision as follows:—"The codicil propounded is *ex facie* perfectly regular as regards all the formalities of signature and attestation. The presumption *omnia rite esse acta*, therefore applies to the codicil. But the conduct of the testator both in the preparation of the codicil and in the calling together of his witnesses, shews an anxious and intelligent desire to do everything regularly. That fact strengthens the presumption. That presumption is not, in my opinion, rebutted by the evidence of the two witnesses who think that the testator did not sign in their presence, for these witnesses were somewhat nervous and flurried on the occasion, and were accordingly confused and forgetful in the witness-box. They were witnesses about whose honesty the learned President of the Probate Division entertained no doubt, but on whom he, who saw and heard them, felt that he could not rely to rebut the presumption which arises from the admitted facts of the case."

Cotton, L.J., though thinking that he would himself have come to a different conclusion on the evidence, yet having regard to the principles on which the Court acts on appeals as to questions of fact, he did not feel able to overrule the decision of the judge of first instance who had seen the witnesses.

## REPORTS.

## ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

## MASTER'S OFFICE.

## HUGHES V. REES.

*Res judicata*—*Pleading*—*Estoppel*—*Allowance to trustee under a void instrument*—*Husband and wife*—*Agency*—*Maintenance of children*.

Where a party does not plead a prior judgment in bar by way of an estoppel before a judgment directing a reference to the Master, he leaves the whole matter open, to be enquired into on the evidence.

The Master has no jurisdiction to amend pleadings after judgment; nor could he give effect to a statement filed in his office raising a defence which ought to have been set out in the pleadings.

A trustee who has been induced by a settlor to accept a trust under a deed void by the law of the settlor's domicile is entitled to be re-imbursed all his charges and expenses incurred in the execution of the trust.

A clause indemnifying the trustee is infused into every trust deed; and the statute R. S. O. c. 107 s. 3, does little more than what Courts of Equity do without any statutory direction.

Where a husband turns his wife out of his house he sends her forth as his agent to pledge his credit for the necessaries of life suitable to her position.

When a father could have obtained possession of his children by *habeas corpus*, but does not do so, he consents to be liable to the person in whose case the children are, for their support and maintenance.

(Mr. Hodgins, Q.C.—June 7.

This was a reference under a judgment reported in 5 Ont. R. 654. The material facts appear in the judgment.

*S. H. Blake*, Q.C., and *Morphy*, for plaintiff.

*MacLennan*, Q.C., and *Kingsford*, for defendant.

THE MASTER IN ORDINARY.—The judgment directs an enquiry whether the plaintiff has any valid claim against the defendant for the maintenance and support of the defendant's wife and children; and also, whether the plaintiff has been put to any other expenses or charges in respect of the support of the supposed trust deed—which, by the judgment, had been declared invalid.

Against the claim made by the plaintiff, the defendant contends:—rst. That the question of the personal liability of the defendant to the plaintiff for the support of the defendant's wife is *res judicata* by virtue of a judgment against the plaintiff in an action brought by the plaintiff against the defendant for the same claim in the Superior Court of Quebec: *Hughes v. Rees*, 5 Quebec Leg. News 70. 2nd. That the trust deed being void.

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[Master's Office.]

the plaintiff is not entitled to any claim for his expenses themselves.

As to the final point, the rule of law has been thus stated:—The judgment of a Court of competent jurisdiction directly on the point is, *as a plea*, a bar; and *as evidence*, is conclusive between the same parties upon the same matter directly in question in another Court: 20 How. St. Trls. 538.

A reference to the cases will show whether the two things, pleading and evidence, are as inseparable of consideration as that the subject matter and the parties should be the same.

A judgment at law is classed as an estoppel by record. And in each species of action such judgment is final in its nature, and according to its class and degree in the order of actions, and for its own proper purpose and object, and upon its own subject matter and no further.

The distinction as to the effect of a judgment when pleaded and when given in evidence was early asserted. In *Trevivan v. Lawrance*, 1 Salk. 276, it was said:—"Not only the parties and all claiming under them, but the Court and jury, were bound by an estoppel, and the jury could not find against the estoppel. But the Court (in that case) took this difference, that when the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel, for there is a good title in the plaintiff, that is a good title at law, if the matter had been disclosed and relied on in pleading. But, if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel."

And in *Outram v. Morewood*, 3 East 346, Lord Ellenborough, C.J., says:—"A former verdict could only be conclusive upon the right, if it could have been used, and were actually used, in pleading by way of estoppel—which could not be in this case: 1. Because no issue was taken in the first action upon the precise point which is necessary to constitute an estoppel thereupon in the second action. 2. Because it was not even pleaded by way of estoppel in the second action, but only offered in evidence on the general issue, and in order to be an estoppel it must have been pleaded as such by apt averments."

So in *Vooght v. Winch*, 2 B. & Ald. 668, Abbot, C.J., stated:—"I am of opinion that the verdict and judgment obtained for the defendant on the former action was not conclusive evidence against the plaintiff on the plea of not guilty. It would indeed have been conclusive if pleaded in bar to an action by way of estoppel." And further, "It appears to me that a party by not pleading the

former judgment in bar consents that the whole matter shall go to a jury, and leaves it open to them to inquire into the same upon evidence, and they are to give their verdict on the whole evidence then submitted to the jury."

In *Wood v. Jackson*, 8 Wend. 37, the learned judge, in commenting on the above case, says: "The distinction is a sound one, and the reasoning is satisfactory, because the general rule *nemo debet bis vexari*, is still preserved; the party to be affected may insist upon its protection by pleading; or he may waive it by leaving the matter at large upon the pleadings. If he will waive when he might insist upon it, he cannot afterwards assert it."

These observations apply to this case. The defendant had an opportunity of pleading the judgment of the Quebec Court when, on the 7th March, 1883, the plaintiff obtained leave to amend his bill of complaint generally on or before the 10th September, but he did not apply for such leave, nor did he plead as I think he might have pleaded, without leave, the estoppel of this Quebec judgment. During the argument an application was made to me for leave to plead it or to file a statement raising it in the Master's office; but I know of no authority for such amendment after judgment; and the Court has not given the Master the jurisdiction usually vested in an arbitrator "to make all necessary amendments to the pleadings as a judge at *Nisi Prius*." And as to filing a statement in the Master's office I would be introducing a novel evasion of an established practice, for the cases show that to be effectual, such a defence must appear on the pleadings and not in the papers filed in the Master's office.

I must, therefore, hold that the defendant, by not pleading the Quebec judgment, has in effect consented to the whole evidence being considered on the merits, and that he cannot now rely upon the judgment of the Quebec Court as an estoppel against the plaintiff's claim.

The second ground of defence also fails. *Smith v. Dresser*, L. R. 1 Eq. 651, is no authority in favour of the defendant, for in that case the learned judge pointed out that the trustees were, or ought to have been aware that the trusts of the deed were all invalid before they began to act upon them. But this case is the other way. The defendant is a resident of Quebec, while the plaintiff is a resident of Ontario. The defendant must be presumed to know the law of his domicile, and, by that law, this trust deed is void. Yet, having that presumptive knowledge, he induced the plaintiff to act as one of the trustees under this void trust deed. And now after it appears that the plaintiff has paid moneys for the support of his (the defendant's)

Master's Office.]

HUGHES V. REES.

[Master's Office.

wife, on the faith of this trust deed, this defendant invokes the law of his domicile and succeeds in setting aside the deed, and now comes before me and contends that all the payments so made by the plaintiff should be disallowed.

It might be sufficient in this case to apply the rule that where a party by his representations induces another to make advances, or to alter his position, he shall make good his representations, and indemnify such other party for his advances: *Freeman v. Cooke*, 2 Ex. 654. But the rule of all Courts of Equity affecting such trusts as the present is that where parties place others in the position of trustees, they are in equity personally bound to indemnify them against the consequences resulting from that position: *Ex parte Chippendale*, 4 DeG. M. & G. at p. 54.

It is, says Lord Eldon, in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all his charges and expenses incurred in the execution of the trust: *Worrall v. Harford*, 8 Ves. 8. And the Court infuses such a clause into every trust deed: *Dawson v. Clarke*, 18 Ves. 254. The statute does little more than what a Court of Equity would have done without statutory direction: R. S. O. c. 107, s. 3.

This indemnity may be enforced even when the trust deed is void, unless the expenditures are made with the knowledge of the invalidity of the trust deed: *Smith v. Dresser*, L. R. 1 Eq. 651. Thus a trustee acting *bona fide*, and with the concurrence of the heir-at-law, under a will which was supposed to be valid as to real estate, but which turned out to be invalid, was held entitled to be indemnified out of the estate: *Edgecumbe v. Carpenter*, 1 Beav. 171. And where trustees under a void deed had acted *bona fide*, they were allowed the moneys they had paid, and the value of the material they had supplied, according to the terms of the trust deed: *Wood v. Axton*, 1 W. Notes 207. So when the Court finds a trust deed or a will and a fund, it avails itself of the fund to relieve the difficulties created by the instrument: *Mohun v. Mohun*, 1 Swans 201. And trustees under a void settlement will be allowed their costs against the settlor who has occasioned them by his own voluntary act: *Daking v. Whimper*, 26 Beav. 568. See also *Morison v. Morison*, 3 Sm. & Giff. 564; 7 DeG. M. & G. 214; 1 Jur. N. S. 339, 1,100. *Attorney-General v. Norwich*, 2 M. & C. 406; 1 Keen 700; 1 Jur. 398; *Nelson v. Duncombe*, 9 Beav. 211, 10 Jur. 399.

There is a conflict of evidence as to what took place between the defendant and the plaintiff's agent respecting the removal of the defendant's

wife from the Longue Pointe Asylum, in March, 1877. The defendant while giving his evidence, betrayed a very strong bias, and appeared to give his evidence in a reckless manner. One witness was called to sustain him, but his evidence if material only proved that after the removal of the defendant's wife from the Asylum, the defendant stated he would not be liable for her maintenance. Yet after this he gives to the plaintiff's agent two cheques for \$150 and \$144.50 towards the payment of the wife's expenses—without limiting by word or writing his further liability. And in a week or so afterwards when replying to the plaintiff's letter respecting a proposed pilgrimage, and his wife's health, he never refers to the alleged removal of his wife from the Asylum without his consent or against his wishes—nor intimates to the plaintiff any repudiation of liability for the future support of his wife. His reply to that letter refers to his non-liability on a promissory note; and in it he commissions his wife and her relations to decide upon her movements in these words: "When Father Dowd called as to the pilgrimage, I wrote that he had better consult with Anne's relations; and I can only say that they and she must decide as to her going or not." The defendant's evidence is also inconsistent with his acts and writings at the time. On the whole evidence, I must find that although he opposed his wife's return to his own house, he did not oppose, but in fact assented to her removal from the Asylum, and to her going to Toronto, and that he admitted a liability to the plaintiff for her support by paying to him in advance the two cheques already referred to.

This conclusion is further borne out by the subsequent conduct of the defendant when his wife returned to his house in October, 1878. Whatever may have been his intention respecting his wife's support prior to that time, his conduct then clearly establishes his liability. He had then the opportunity—if she was, as he now contends, suffering from mania—of taking that charge and care of her which by virtue of his relationship, and his duty to her and to the law, he was bound to do, and, if lawful for him so to do, of placing her again in the Asylum. But his own statement on oath shows that he turned her out of his house, and so sent her into the world as his delegated agent to pledge his credit for the necessities of life suitable to her position: *Garland v. Birchell*, 3 Q. B. D., 432.

The plaintiff was present when the defendant put his wife out of his house, and again took charge of and supported the defendant's wife, and for his reasonable expenses for such support and maintenance, he has a valid claim against this

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[Co. Ct.]

defendant. The claim will be allowed up to the date of the judgment allowing alimony to the wife in the Quebec Superior Court.

The plaintiff also claims to be allowed what he has expended for the support of the defendant's children subsequently to the 10th February, 1879. The reasons which induced these children to leave the defendant's house and place themselves under the plaintiff's care are set out in the letter of the defendant's daughter which was put in evidence at the request of the defendant's solicitor. That letter and the frequent references in the evidence to the home life of the defendant which he never denied, warranted the children in seeking a purer home. The defendant as their father, could, if the *inuendo* was untrue, have obtained possession of their persons by *habeas corpus*. But he did not do so, and therefore he must be held to have consented to be liable to the plaintiff for such sums as were reasonable to be expended for their clothing and maintenance: *Griffith v. Paterson*, 20 Gr. 615.

#### COUNTY COURT OF LANARK.

#### BELL V. GRAND TRUNK RAILWAY CO.

*Foreign Corporation—Jurisdiction—Division Courts—Where cause for action arose—O. J. A., Rule 80.*

[Brockville, June 30.]

This was a motion by plaintiff for judgment under Rule 80, O. J. A.

*Hall*, for plaintiff.

Mr. Stewart (John Bell, Q.C.) for defendant.

W. S. SENKLER, Co. J.—The amount of the plaintiff's claim having been paid after statement of defence filed and delivered, it is only necessary to examine the plaintiff's cause of action to enable a proper disposition of the costs to be made.

The plaintiff's cause of action was that he engaged the defendants to carry a car load of stock, etc., from Brockville, in Ontario, to Brandon, in Manitoba, prepaying therefor \$219.50; the goods were carried by defendants and connecting lines to Brandon; plaintiff was obliged to pay the C. P. R., the last of these connecting lines, \$27.70 to procure the release of his goods, which sum he seeks to recover from the defendants, with interest and costs. The contract was made in Brockville, and the breach took place at Brandon, consequently the whole cause of action did not arise within the boundaries of any of the Division courts in Ontario.

The defendants being a corporation, having its head office at Montreal, in the Province of Quebec, the residence of the defendants is to be taken to be at Montreal: *Ahrens v. McGilligat*, 23 C. P. 171.

Whether Division Courts in Ontario have jurisdiction over corporations, situated as the defendants are, even where the cause of action arose within the boundaries of any of the Divisions for Division Court purposes in Ontario, and whether the objection was tenable in the absence of a notice under section 14 of Act of 1880, were discussed. In my opinion, the Division Courts in Ontario have no jurisdiction over a corporation whose residence is to be deemed as out of the Province of Ontario. In *Ladouceur v. Salter*, 6 P. R. 305, service on a man out of the jurisdiction, who legally resided in the jurisdiction of the proper Court, was held good. Residence further becomes material under section 71, to settle within what time the writ should be returnable. I think that section is to be read as residing within some county in Ontario other than the county in which the action is brought or adjoining county (see also *Ont. Glass Co. v. Swartz* 9 P. R. 252). I think it clear that section 14 only applies to cases of the competence of the Division Court but entered in the wrong Court: *Mead v. Creary*, 32 C. P. 1.

It was contended that the plaintiff should have sued in a Division Court in Montreal, but no evidence was offered as to the existence of such a Court: even if there is such a Court, I know of no authority compelling a plaintiff to resort to a foreign Court when substantial justice can be secured in his own country. A strong reason why a plaintiff should be allowed to sue in his own country is, he thereby avoids what might be a serious difficulty in another Province, viz., giving security for costs.

The defendants now claim that the debt having been admitted, and Division Court costs offered, no more should now be allowed. The plaintiff, when first asked for evidence of payment to the C. P. R., took the very proper course of drawing on the defendants, attaching the C. P. R. receipt to the draft, but the latter was dishonoured. The defendants never offered any payment until the statement of defence was due, and the payment was not made until after statement of defence was filed. The latter was a denial of the claim. I think the plaintiff gave the defendants full opportunity to settle before suit. I therefore think that, both on the law, the plaintiff is entitled to an order for judgment for full costs of suit, and also that in the exercise of the discretionary powers vested in me over the costs, it would be harsh to deprive the plaintiff of his full costs.

Ct. Ap.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

**NOTES OF CANADIAN CASES.**PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.**COURT OF APPEAL.****COOPER V. DIXON.***Trust deed for benefit of creditors.*

A trader, who was in embarrassed circumstances, made an assignment for the benefit of creditors, of all his estate, real and personal, to the plaintiff, who held a mortgage on a part of the realty as security against his endorsement for the assignor, on notes then current. No creditor joined in the conveyance, nor was the consent to or knowledge of it by any creditor shown.

*Held*, affirming the judgment of the County Court, that the property was liable to seizure under execution; for under the mortgage the trustee was not a creditor, but

*Seemle*—per PATTERSON, J. A., that had the trustee been beneficially interested in the proceeds of the property, his assent would have rendered the deed irrevocable.

**VOGEL V. GRAND TRUNK RAILWAY CO.**

This court being equally divided the judgment of the court below, 2 O. R. 197, that the Railway Act, 1879, s. 25, s.-s. 4, does apply to the G. T. R. Co. was affirmed.

**IN RE CHARLES.**

*Held* (BURTON, J. A., dissenting) reversing the decision of the court below, 1 O. R. 362, on the facts there stated, that the children of the testator who survived the widow, and attained 21 years of age, took vested interests, and that the grandchildren took nothing.

**GAGE V. CANADA PUBLISHING CO.**

The judgment of FERGUSON, J., reported 6 O. R. 68, was affirmed.

**CORBETT V. JOHNSON.***Practice—Damages for non-completion of contract.*

Plaintiff agreed to complete a steam engine by a certain day, to be delivered to the defend-

ant who had previously been using water power in his mill. The engine was not completed and delivered for some time afterwards. The Master, in estimating the damages of the defendant, allowed him, in addition to rental of the mill and interest on the value of the machinery and of logs waiting to be sawed, loss of profit, \$118. On appeal from his report PROUDFOOT, J., made an order which contained a declaration, "That the true measure of damages the defendant is entitled to claim is the amount which would have been earned by the mill in the ordinary course of employment," and referred it back to the Master to review his report. An appeal to this Court was allowed, the Court being of opinion that the Master could not, on the direction given him, find otherwise than he had done.

*Bethune, Q.C., and Creasor, for appeal.*

*Lane, contra.*

**KELLY V. IMPERIAL L. & S. Co.***Foreclosure—Redemption—Conveyance for value.*

The defendants assumed to foreclose a term mortgaged to them by the plaintiff. They subsequently sold and assigned the term by a conveyance which did not recite or otherwise indicate the title under which they claimed. The plaintiff brought an action to redeem the premises on the ground that the foreclosure was void.

*Held*, that the conveyance being for value might be supported as an exercise of the power of sale contained in the mortgage.

*Moss, Q.C., and Cassels, Q.C., for appeal.*

*Plumb and Nesbitt, contra.*

**CHANCERY DIVISION.**

Ferguson, J.]

[September 4.]

**HALLIWELL V. THE SYNOD OF ONTARIO.***Revocation of license by Bishop without trial—  
Diocesan Court.*

The Rev. J. H., being the incumbent of a parish in the Diocese of Ontario, which was endowed, and having acted in such capacity and performed the duties thereof for several years, discontinued the services in two other

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

churches which were attached to his parish. A commission was issued by the Bishop, under the provisions of Canon No. 8, of the Synod of the said diocese, "To enquire, into the causes which led to the closing of the said churches, and to report whether there was 'lawful excuse' for the said Rev. J. H.'s discontinuance of the exercise of his ministerial offices in said churches, and to report whether there was sufficient *prima facie* ground for instituting further proceedings against the said Rev. J. H., as provided by said canon."

The Commissioners reported that the churches had been closed "because the members of the church refused to attend, and provide for the ministrations of the Rev. J. H. in these churches;" that an estrangement existed between the said Rev. J. H. and his parishioners, and that they decline his ministrations. But that in their opinion (the Commissioner's) the proofs adduced were not of such a nature as could be relied on to procure a conviction in an Ecclesiastical Court; and they declined to recommend the prosecution of further legal action, although they believed that there was no hope of a restoration of his ministerial usefulness there, and that there was a sufficient *prima facie* ground for instituting further proceedings against him as provided by Canon 8; but they were of opinion that without the production of other and much stronger evidence than that adduced, the institution of further proceedings would not result in a charge of breach of discipline under the said canon being sustained. After the making of this report, and upon the said Rev. J. H. refusing to resign his said incumbency, the Bishop, by an instrument, under seal, revoked, or purported to revoke, his license, and appointed the Rev. A. F. E. as his successor, and the Synod declined to pay him (the Rev. J. H.) the annual proceeds of the endowment. Upon an action being brought by the said Rev. J. H. to compel the Synod to pay him such annual proceeds, it was

*Held*, that the offence (if any) came within the second section of the canon; that any one charged with such an offence has the right to be tried, under section one, by the Diocesan Court, and has the right of appeal to the Metropolitan, under section thirteen, and that the Bishop had not the power to cancel and

annul the license of the plaintiff, either without or for cause, without a trial by the Diocesan Court, and that the plaintiff must succeed.

*S. H. Blake, Q. C.*, for the plaintiff.

*Walkem, Q. C.*, for the defendants the Synod.

Boyd, C.]

(September 5.

GRASETT V. CARTER.

*Motion to commit—Revivor of the case in Appeal—Service of certificate of Supreme Court—Specific acts of disobedience of an injunction—Mandatory injunction.*

On a motion to commit a defendant for non-compliance with a decree which contained this clause: "And this court doth further order and decree that an injunction be awarded to the plaintiff, perpetually restraining the defendant, his servants, workmen, and agents, from trespassing upon the lands of the plaintiff in the pleadings mentioned." The trespass complained of being two walls built by the defendant on four inches of the plaintiff's land, it was objected. (1) That the suit was revived while pending in the Court of Appeal, by an order issued from the Division of the High Court of Justice, appealed from. (2) That the certificate of the Supreme Court (which had in substance affirmed the decree) had not been served; and (3) that the notice of motion did not specify the acts of disobedience. It was

*Held*, that the suit was properly revived. That it was not necessary to serve the certificate of the Supreme Court, when the decree was not materially altered, and when the defendant well knew that the decree would be enforced, and that where (as in this case) a correspondence had shown the defendant what acts were complained of, it was not necessary to repeat them in the notice of motion, and the objections were overruled.

*Held*, also under the form of the decree the plaintiff was entitled to have the walls removed, and if the defendant did not remove them within a month, the order must go.

*MacLennan, Q. C.*, and *E. D. Armour*, for the plaintiff.

*George Bell*, for the defendant.

Prac.]

NOTES OF CANADIAN CASES—LAW STUDENTS' DEPARTMENT.

Proudfoot, J.]

[October 9.

MORROW V. JENKINS.

*Will—Devise of interest—Right to principal.*

The will of a testator contained the following clause: "To my daughters Ellenor and Mary Mariah, I give devise and bequeath the interest of three thousand dollars each per annum to be paid to each of them half-yearly."

*Held*, that the devisees took an absolute interest in the \$3,000 given to each of them.

*Elton v. Sheppard*, 1 Bro. C. C. 532 cited, referred to and followed.

*Garrow*, for the plaintiffs.

*Moss*, Q.C., for the defendants.

## PRACTICE.

Dalton, Q. C.]

[Oct. 2.

TILSONBURG MANUFACTURING CO. V.  
GOODRICH.*Examination of parties.*

In an action in the Q. B. Division, the defendant issued an appointment and subpoena for the examination of an officer of the plaintiff's company before issue joined, but after the delivery of the statement of defence no affidavit was filed with the officer who issued the appointment.

*Held*, that the Chancery practice of examining the parties before issue joined, is now in force in all divisions, but

*Held*, also that in an action in a Common Law Division, an appointment to examine should not be issued by an officer of the court unless an affidavit is filed with him, as directed by sec. 159 of the C. L. P. Act.

Appointment set aside.

*Aylesworth*, for the plaintiffs.

*Mack*, for the defendant.

## LAW STUDENTS' DEPARTMENT.

## LAW SOCIETY.

## EXAMINATION QUESTIONS.

## TRINITY TERM:

## FIRST INTERMEDIATE.

*Equity—Honors.*

1. A. by deed purports to convey certain lands to his brother, which lands in fact belong to his son, and he subsequently by will devises certain of his own lands to his said son, who, after A.'s death, claims to hold all the aforesaid lands as his own, while the brother of the testator claims to have acquired an interest therein under the aforesaid instruments. What are the rights of the parties? Give reasons.

2. Give an example illustrating the rule that equity will sometimes relieve one of two persons in respect of an illegal transaction in which both are concerned, upon the ground that they are not *in pari delicto*.

3. State a case in which a tenant is entitled to seek equitable relief by way of interpleader with respect to his rent.

4. Give a general statement of the rules of equity with regard to the right of custody of children, showing (a) the cases in which the parents will be deprived of such custody, (b) the relative rights of father and mother to such custody.

5. A man by his marriage settlement covenants to pay to trustees for his wife \$500 per annum as pin money. During the first two years of their married life she in each year spends and receives from her husband but half of her allowance; the trustees, on the wife's behalf, bring action against the husband to recover the arrears. Can the husband successfully resist their claim or any part thereof? Give reasons.

6. A married man desires his wife to join with him in a conveyance, for the purpose of barring her right to dower which she has in certain of his lands, and in order to induce her to do so he procures his solicitor to exhibit to her a legal text-book, in which it is stated that a wife is not entitled to dower in the lands of her husband. The text-book is in fact one relating to the laws of a foreign country. The wife, relying upon the statement of law contained in the book, joins in the conveyance, and afterwards brings an action to set the same aside. The husband defends the action, relying upon the maxim, *ignorantia legis non excusat*. Discuss the relative rights of the husband and wife upon this state of facts.

## LAW STUDENTS' DEPARTMENT.

7. State a case in which equity will avoid a contract on the ground of duress.

## SECOND INTERMEDIATE.

*Williams on Personal Property—Judicature Act.*

1. State briefly the right of a tenant as against his landlord to remove fixtures put in the demised premises by the tenant.

2. "*The requisites for the sale of goods partly depend on their value.*" State fully the reason of the above assertion, and mention briefly the *requisites* referred to.

3. Write short notes on the statement, "*But a contract is not rendered void by having for its object the restraint of a person from trading in a particular place.*"

4. State what is meant by a *Wager Policy* of insurance, and mention cases in which an insurance effected by one person on the life of another is valid.

5. If money be settled in trust for A. for his life, and after his decease in trust for his executors, administrators and assigns, what interest will A. take?

6. Where a defendant sets up by amendment in his statement of defence a ground of defence which has risen after the action commenced, what courses are open to the plaintiff under the Judicature Act?

7. State briefly the ordinary method under the Judicature Act of compelling production and discovery of documents before the close of the pleadings.

## Honors.

1. Under what circumstances can the bailor and bailee respectively maintain trover for property bailed?

2. State briefly the effect on actions *ex delicto* of the death of either party at common law and under statutes now in force.

3. How can debts due to a judgment debtor be reached by a judgment creditor?

4. What is the effect of a grant by deed to A. for his life of a chattel real or personal? What is the effect of a bequest of a term of years to A. for life, and after his death to B.? Give reasons for your answers.

5. Point out any differences in regard to the rules relating to attempted restraint on marriage as applicable (a) to the laws of real property, and b) to the laws of personal property.

6. Mention cases formerly of the competence of Common Law Courts the procedure in which does not come within the Judicature Act.

7. The pleadings are closed in an action with a statement of claim and statement of defence only. How would you decide on whom was the burden of proof at trial? Answer fully, giving reasons.

## Real Property.

1. What is an estate upon condition? Give examples of the different kinds of such estates.

2. Explain what was meant by subinfeudation, and state what legislative change was made with regard to it.

3. What may, and what may not, be entailed? What is the effect of an attempted entail of that which cannot be entailed?

4. It is said that to an assignment of a mortgage the mortgagor should, if possible, be a party. Why is this?

5. A grant is made to A., a bastard, and his heirs general. What estate does he take? Why?

6. *Falsa demonstratio non nocet*. Explain.

7. What persons are incapable of making a will by the law of Ontario?

## Honors.

1. A. agrees in writing "to sell all that certain piece of land called Whiteacre to B." What estate or interest has B. in the land by virtue of his contract, and what estate can he demand to have conveyed to him? Why?

2. What is the difference between a base fee at Common Law and a base fee under the Act respecting entails?

3. A. and B. enter into partnership for the purpose of buying and selling lands. To what extent are their wives interested in the lands which they buy for sale?

4. A mortgage is made to A. in fee simple. A. dies intestate. The mortgagor desires to pay off the mortgage and obtain a discharge. To whom should he pay the money, and who should execute the discharge? Why?

5. What is a strict settlement?

6. What was, and what is now, the law as to title by occupancy?

7. What is meant by an innocent conveyance? Explain fully.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

EASTER TERM, 47 VICT., 1884.

During this term the following gentlemen were entered on the books of the Society as Students-at-Law:—

Graduates—C. I. T. Gould, S. C. Warner, W. T. Kerr, Ernest Heaton, F. M. Field, John A. Davidson, H. H. Langton.

Matriculants—A. A. McMurchy, J. F. Edgar, A. L. Baird, J. A. Macdonald.

Juniors—A. McDonell, J. G. Gauld, C. D. Scott, H. Scott, H. F. Errett, J. G. Kerr, T. Graham, W. J. McKay, H. Millar, W. B. Scane, D. T. K. McEwan, C. Pierson, E. M. Lake, R. M. Thompson.

The following gentlemen were called to the bar, namely:—

David K. I. McKinnon, honor man and gold medalist; Alexander Mills, honor man and bronze medalist; Alexander W. Ambrose, Alfred Craddock, Edmund Sweet, William J. Code, William A. Dowler, Andrew C. Muir, Edwin R. Reynolds, Thomas B. Shobotham, Arthur W. Morphy, Charles H. Cline, John W. Russell, James W. Hanna, Robert N. Ball, Gerald Bolster, Robert Christie, William Cook, Robert A. Pringle, Jos. Walker.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

## Articled Clerks.

- 1884  
and  
1885.
- Arithmetic.
  - Euclid, Bb. I., II., and III.
  - English Grammar and Composition.
  - English History—Queen Anne to George III.
  - Modern Geography—North America and Europe.
  - Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

## Students-at-Law.

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.  
Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar,  
Translation from English into French prose.  
1884—Souvestre, Un Philosophe sous le toit.  
1885—Emile de Bonnechose, Lazare Hoche.

## OR NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

## First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchor, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

**F E E S .**

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above .....	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

*Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.*

# Canada Law Journal.

VOL. XX.

NOVEMBER 1, 1884.

No. 19.

## DIARY FOR NOVEMBER.

1. Sat.....All Saints' Day.
2. Sun.....21st Sunday after Trinity.
3. Mon.....Draper, C.J., died 1877.
4. Tues.....First Intermediate Examination.
5. Wed.....Sir John Colborne, Lt.-Gov. U. C., 1838.
7. Fri.....Prince of Wales born, 1841.
9. Sun.....22nd Sunday after Trinity.
11. Tues.....Court of Appeal Sittings. Solicitors' Examination.
12. Wed.....Barristers' Examination.

TORONTO, NOVEMBER 1, 1884.

WE have received, just before going to press, from the publishers, D. Appleton & Company, a collection of the speeches, arguments and miscellaneous papers of David Dudley Field, the eminent American jurist, to whom, we believe, was mainly due that amalgamation of law and equity which was first effectuated in America, and afterwards introduced into the legal systems of England, and later still into our own. We look forward with much interest to a perusal of these volumes. At present we have merely had time to glance at some of the miscellaneous addresses and papers on law reform, which bear such titles as the 'Study and Practice of the law, Magnitude and importance of legal science, the Law and the legal profession, the Duty of lawyers to the law. In one of these Mr. Field gives as his idea of a true lawyer a picture, the realization of which, in some respects, is almost out of the reach of those who practise in countries where the two professions are united, whatever it may be where barristers are able to give a life-long study to the science of law, undisturbed by the "loss of love and labor" involved in solicitors' practice. "The true lawyer," says Mr. Field, "is he who has mastered

the science of jurisprudence in its elements and its details; who has compared the laws of his country with the laws of other countries and with the wants of his own; who is always ready to enlarge and beautify the edifice which generations have raised; who holds his learning and eloquence at the service of the injured; who never prostitutes them to a bad cause; and who everywhere approves himself the friend of order and the adviser of peace."

## RECENT ENGLISH DECISIONS.

The October number of the *Law Reports* consist of 13 Q. B. D. pp. 505-651, and 26 Ch. D. pp. 693-823.

### LANDLORD AND TENANT—COVENANT FOR QUIET ENJOYMENT

In the former of these the first case requiring notice is *Sanderson v. The Mayor, etc., of Berwick-upon-Tweed*, p. 547, and is an instructive one on the subject of the covenant for quiet enjoyment in a lease, and what constitutes a breach of it. The lessee of the plaintiff had previously to the plaintiff's lease, leased the farm next adjoining above the plaintiff's to one C., the general words of demise, including the words, "waters and watercourses." Afterwards the lessee leased to the plaintiff his farm with a covenant for quiet enjoyment. The plaintiff complained of damage done to his farm, partly owing, or in part possibly owing to an excessive user on the part of C. of the drainage system which extended through his, C.'s, and the plaintiff's, farm, and partly arising from a tile drain conduit extending through the plaintiff's farm, a portion of the drainage system being imperfectly constructed. As to the former the Court of Appeal held

## RECENT ENGLISH DECISIONS.

that the defendants were not liable, for C., and not they caused or permitted the injury: "They are not liable on the ground that it is a disturbance by a person lawfully claiming under them, because the lease gave C. no lawful claim to do the act complained of. (It would be giving a very strained and violent effect to the words 'waters and watercourses' in the lease to C. if we held they were an authority to the lessee thus to injure at once his neighbour and the soil of the demised farm by an accumulation of water.) They are not liable on the ground that they demised to C. a thing dangerous or injurious to the plaintiff, even assuming such ground to be sufficient, for the drainage system is not found to have been improperly constructed, and it was injurious only when used to carry off more water than it could carry away, and unless on one or other of these three grounds we do not see that the defendants can be liable, whether under their covenant for quiet enjoyment or under the law of trespass or nuisance." But as to the latter injury the Court held the defendants were liable. As to this they say: "The damage here has resulted to the plaintiff from the proper user by C. of the drains passing through the plaintiff's land, which were improperly constructed. In respect of this proper user C. appears to us to claim lawfully under the defendants by virtue of his lease, and to have acted under the authority conferred on him by the defendants. . . . It appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected."

## PROSPECTUS—FALSE AND FRAUDULENT STATEMENTS.

Of *Bellairs v. Tucker*, p. 562, it seems sufficient to say that it illustrates the length to which a prospectus of a company may go in puffing the company, provided the statements in it are expressions of hope or belief only, and not statements of alleged existing facts.

## INTERPLEADER—TAKING INDEMNITY.

At p. 632 is a case entitled, *In the matter of an interpleader issue between Thompson and Wright*, which decides that the objection that a stake-holder (and the same would presumably apply to a sheriff) has, by merely taking an indemnity from one of two rival claimants to property in his hands, disentitled himself to relief under the Interpleader Acts because he has identified himself with and must be taken to "collude" with the claimant who gave the indemnity, cannot be raised by that claimant himself, and the decisions in *Tucker v. Morris*, 1 Cr. & M. 73, and *Betcher v. Smith*, 9 Bing. 82 do not apply. It may be observed that this is a case where application had been made under the new English rule of 1883 whereby the benefits of interpleader under the Judicature Act is extended to all who are in possession of goods to which claims are made, though they may not have been actually sued.

## PATENT—INFRINGEMENT—INJUNCTION.

Passing now to the October number of cases in the Chancery Division, the first which calls for special notice here is *United Telegraph Company v. London and Globe, etc., Company*, p. 766. In this case the defendants were in possession of a number of machines which infringed the plaintiff's patent. On the plaintiffs bringing an action to restrain the infringement, the defendants excused themselves on the ground that they did not intend to use the machines. BACON, V. C., granted the injunction but refused to order the destruc-

## RECENT ENGLISH DECISIONS.

tion or delivery up of the machines. He says, at p. 775: "If it is not their (the defendant's) intention to use the instruments, then the injunction asked for can do them no harm. That would not be enough to dispose of the case, but it is the right of the plaintiffs to have an injunction against the defendants who have the means, to the extent of 800 machines of injuring their rights. . . . As to the delivery up, I cannot say I see my way to make any order. The consequence might be to do more mischief; it might be merely to destroy. All I have to do in this suit is to entertain the plaintiff's application that they may be protected against a wrong which is imminent unless prevented by injunction, and, therefore, to that extent, I grant the injunction."

## EXECUTOR OF MORTGAGOR—DEVASTAVIT—MORTGAGE.

Next has to be noticed *In re Marsden*, p. 783. In this case a testator mortgaged certain parts of his property, and the mortgage deeds each contained the usual covenants for payment of the mortgage debt. He died, and appointed executors, who took possession of his estate, including the leasehold property, which was the subject of the mortgages, and for a long time paid the interest due upon the mortgages, clearly recognizing, therefore, the debt. A judgment had been obtained in an administration action against these executors, and in the accounts which were brought into Chambers the executors charged themselves with the receipt of assets, and in the discharge they attempted to introduce certain payments made more than six years ago by them to some of their legatees. And although the ordinary rule is to disallow such payments, as not being a proper discharge as between executors and the creditors of the estate, they said the payments were made more than six years ago, and, therefore, all remedies in respect of them were now

barred by the lapse of time. KAY, J., however, held that the executors, having acknowledged the mortgage debt by payment of interest, and being bound in equity by a trust properly to deal with the assets, could not set up their own wrong by way of *devastavit* as a defence in order to claim the benefit of the Statute of Limitations. He says, at p. 787: "I never yet heard that executors, by way of discharge in equity, as against a creditor, whose debt they acknowledge, as they have been paying interest upon it for many years, could set up their own wrong by way of *devastavit*, and say we admit a *devastavit*, knowing of your debt, because we have been paying interest all the while; but seeing that we did it more than six years ago we can set up a defence by treating the claim as founded on a *devastavit* committed more than six years ago. . . . I certainly dissent from any doctrine of the kind. . . . What is the ordinary trust when an executor acknowledges a debt and pays interest upon it? Is it not to preserve the assets for payment of that creditor, and to take care not to dispose of them, either by putting them into his own pocket, or by paying them away to the legatees, or by otherwise committing a *devastavit*? Most certainly it is; and in equity the executor is bound by a most direct trust to deal properly with the assets and to apply them in due course of administration of the estate for the creditor he has so acknowledged."

CONDITION—REPUGNANCY—RESTRAINT ON ALIENATION—  
OBITER DICTA.

Lastly, must be noticed a case of, *In re Rosher*, *Rosher v. Rosher*, p. 801, which in the words of the headnote shows that a condition in absolute restraint of alienation annexed to a devise in fee, even though its operation is limited to a particular time, *e.g.*, to the life of another living person is void in law as being repugnant to the

## RECENT ENGLISH DECISIONS—LAW SOCIETY.

nature of an estate in fee. The case is an interesting one, amongst other reasons, because the restraint did not on its face appear to be an absolute restraint on alienation at all, being merely that if the testator's son was minded to sell during the life of the testator's widow, the estate must first be offered to the latter at the price of £3,000 for the whole or a proportionate sum for a part. The estate was proved to be worth £15,000. Pearson, J., held this to amount to an absolute restraint against sale during the life of the widow. He says: "To compel him (the son) if he does sell, to sell at one-fifth of the value, and to throw away four-fifths of the value of the estate is, to my mind, equivalent to a restraint upon selling at all." He thus reduces the question to whether it is or is not the law that to a devise in fee simple you may annex a condition that during a limited period the devisee shall not sell at all? He then proceeds in a long and exhaustive judgment to trace the law as to restraints on alienation from the time of Coke, and as to the exceptions which have been made to the general law, e.g., in the case of restraint from aliening to a particular person, which is plainly just as repugnant to the gift as any other condition would be. The question of policy, has he says, p. 814, been allowed to intervene, omitting altogether all considerations of repugnancy. Coming to the case immediately before him, he says, p. 821: "It is a very curious thing that although Littleton's book is more than 400 years old, and although Lord Coke died 250 years ago, there is not a single judicial decision to be found in the books showing that a limitation as to time added to such a condition (restraining alienation) makes it a valid condition." He then adds that if he could find that this had been "an accepted *dictum* of law, and that it was likely to have affected divers contracts and dealings between man and man, and

that by not following it I should be disturbing anything which had been done in former times over and over again on the faith of the *dictum*, I should feel myself bound by it, and should decline to decide in opposition to it." Not finding such to be the case, he says in conclusion, p. 828: "I will not add other exceptions for which I can find no authority, and the addition of which, to my mind, will only introduce uncertainty and confusion into the law which we have to administer. I must, therefore, as regards the condition which relates to selling, declare that it is void." It may be worth while to mention here that two recent decisions on the subject of restraints in alienation in our courts are to be found in *Dickson v. Dickson*, and *Re Carner*. A. H. F. L.

## LAW SOCIETY.

## TRINITY TERM, 1884.

The following is the *resumé* of the proceedings of the Benchers during Trinity Term, published by authority:—

During this term the following gentlemen were called to the Bar, viz.:—Messrs. S. C. Smoke, W. D. Gwynne, S. F. Washington, T. T. Porteous, A. D. MacIntyre, M. M. Brown, W. G. Thurston, T. E. Williams, J. Stewart, N. A. Belcourt, G. W. Field, F. H. Keefer, D. Armour, F. L. Brooke, A. C. Beasley. The names are arranged in the order in which the candidates appeared before Convocation for call.

The following gentlemen received certificates of fitness, viz.:—Messrs. Gwynne, Hutcheson, Smoke, McKinnon, Armour, Urquhart, St. John, Douglas, Thomas, Jackson, Williams, Collier, Brown, Eddis, Yarnold and Brooke.

The following gentlemen passed their First Intermediate Examination, viz.:—Messrs. Reeves, Lyall, Hearst, Duncan, Chambers, Lawson, Johnston, Fraser, McKay, with honours; and Messrs.

## LAW SOCIETY.

Huycke, Reid, Bayley, Weeks, Leggatt, Lee, McGillivray, Helliwell, Willgress, Johnson, Osler, Crease, Tucker, Dalzell, Mills, Taylor, Fraser, Smith, Montgomery, Bankier, Bennett, Young, Mosure, Whitaker, Vance, Considine, Creasor, Dignan, Brydges, Lemieux and Boulton.

Messrs. Reeves, Lyall and Hearst were awarded, respectively, first, second and third scholarships.

The following gentlemen passed their second Intermediate Examination, viz.:—Messrs. Mickle, Godfrey, Latchford, Coleman, Thomas, Code, Esten, Gunther, Douglas, Higgins, MacMurchy, Rutherford, Hill, O'Reilly, Farmer, Smyth, Jell, Creelman, McKechnie, Shibley, Macdonald, Finlay, White, Bell, Campbell, Howard, Roe.

Messrs. Godfrey and Code were awarded first and second scholarships and honours, and Mr. Mickle, who had been prevented from presenting himself for examination in due course, was, under the special circumstances of his case, awarded the third scholarship and honours, although he had obtained sufficient marks to entitle him to the first scholarship if he had been in due course.

The following gentlemen were admitted into the Society as Students-at-Law, viz.:—

*Graduates.*

James Morris Balderson, Alexander Robert Bartlett, Joseph Hetherington Bowes, Samuel William Broad, George Filmore Cane, John Coutts, George Henry Cowan, Robert James Leslie, Archibald Foster May, John Mercer McWhinney, James Albert Page, Horatio Osmond Ernest Pratt, Thomas Cowper Robinette, Robert Karl Sproule, Ernest Solomon Wigle, James McGregor Young, Roderick James MacLennan, George Frederick Henderson, Samuel Walter Perry, Richard S. Box, William Wallace Jones, William Louis Scott, Edmund Kershaw.

*Matriculants of Universities.*

Henry Herbert Johnson, Albert E. Baker, Herbert Holman, Charles D. Macaulay, George Albert Thrasher, John William Seymour Corley.

*Juniors.*

H. E. McKee, E. L. Elwood, W. S. MacBrayne, E. O. Swartz, J. F. Wood-

ward, O. Ritchie, W. A. Skean, R. L. Gosnell, F. E. Chapman, N. Mills, C. J. McCullough, J. McKean.

And the following candidates passed the Articled Clerks' Examination, viz.:—J. A. Webster, A. W. Macdougald.

## MONDAY, 1ST SEPTEMBER.

Present—The Treasurer and Messrs. Moss, Morris, Murray, Hoskin, MacLennan, Read, Ferguson, Bethune and S. H. Blake.

A letter from Mr. J. A. Macdonell to the Treasurer was received and read.

Mr. Murray's notice of motion for a rule amending rule 119, section 2, was adjourned to 2nd inst.

The Treasurer retired, and Mr. MacLennan was appointed chairman.

The letter from Mr. J. A. Macdonell to the Treasurer was considered, and on the motion of Mr. Hoskin, seconded by Mr. Morris, the following resolution was unanimously adopted, viz.:—

"Mr. Macdonell's letter to the Treasurer having been read, be it resolved that the letter is of an offensive character, both to the Treasurer and the Society, and that Mr. Macdonell be forthwith notified and required by the Secretary to withdraw the same on or before the 5th day of September instant."

## TUESDAY, 2ND SEPTEMBER.

Present—Messrs. Read, Moss, Ferguson, Murray, L. W. Smith, J. F. Smith, J. J. Foy, Æmilius Irving.

In the absence of the Treasurer, Mr. Irving was appointed chairman, *pro tem*, of Convocation.

The report of the Library Committee on the subject of Mr. Grasett's salary was read by the Secretary, as follows, viz.:—

## REPORT.

The Library Committee beg leave to report that, in accordance with the resolution of Convocation of 24th June last, they have considered that part of the report of the Finance Committee recommending an increase of two hundred dollars a year to the salary of Mr. Grasett, and now respectfully inform Convocation that they do not concur in the said recommendation.

(Signed) ÆMILIUS IRVING,  
Chairman.

1st September, 1884, Trinity Term.

## LAW SOCIETY.

Mr. Murray, pursuant to notice, seconded by Dr. Smith, moved as follows:—

"That rule number 119, sub-section 2, be amended by striking out the word 'six' in the second line, and inserting instead the word 'eight'; the motion was carried, and the rule amended in accordance therewith."

Mr. Read moved, seconded by Mr. Murray, that so much of the report of the Finance Committee presented to Convocation on 24th June last, as related to the salary of Mr. Grasett, be adopted. The motion was carried.

## SATURDAY, 6TH SEPTEMBER.

Present—Messrs. Moss, J. F. Smith, Hoskin, Foy, Irving, Morris, Kerr, MacKelcan, MacLennan, S. H. Blake, Read and McMichael.

In the absence of the Treasurer, Mr. MacLennan was appointed chairman.

The Finance Committee reported on the subject of the new system of steam heating introduced by the Government in Osgoode Hall, that all the work necessary to enable the Society to avail itself of the new system had been done, that a great saving to the Society would be effected by the Government having assumed the control of the heating and lighting of the courts and offices, and the supply of water to those portions of Osgoode Hall in the occupation of the courts. The report was adopted.

On the motion of Mr. Irving, seconded by Mr. Read,

It was ordered, That the boundaries between the lands of the Ontario Government and the Law Society be accurately defined, bearing in mind the necessity that the west wall of the eastern wing, and the land upon which it stands, and necessary for its support, be vested in the Society, and also that the reason for the title to the land formerly occupied by the boiler house being vested in the Government having now ceased, the same be now conveyed to the Society, and that generally the terms of the deed be reformed in accordance with the original intention in view between the parties at the time of the agreement upon which the said deed was executed.

*Ordered*, That the Finance Committee be instructed to carry out the directions contained in the above order.

On the motion of Mr. Read, the Finance Committee was directed to make certain enquiries respecting the property immediately north of Osgoode Hall, and to report the result to Convocation.

A letter dated 4th September, from Mr. J. A. Macdonell, withdrawing his late offensive letter to the Treasurer, in accordance with the directions of Convocation, was read.

*Ordered*, That Mr. Macdonell's letter be received, and Mr. Macdonell having withdrawn the offensive letter, ordered, that it be returned to him with a copy of this resolution.

On the motion of Mr. Mackelcan, seconded by Mr. Hoskin, it was

*Ordered*, That the Treasurer be requested to represent to the Attorney-General for Ontario that in the opinion of Convocation it is desirable that the Act respecting the Law Society should be so amended as to give to the Benchers in Convocation, or to any committee appointed for the investigation of any matters coming under the jurisdiction of the Benchers of the Law Society, power to take evidence upon oath, and to compel witnesses to attend, submit to examination and to produce books, papers and documents in the same manner and subject to the same conditions as to payment of conduct money, and otherwise, as in the case of witnesses examined at a trial in the High Court of Justice, and to impose such penalty or punishment for refusal to attend to be examined as could be imposed by such court.

On the motion of Mr. Irving, seconded by Mr. Read, it was

*Ordered*, That as it is desirable to settle a rule upon the subject of adorning the walls of Osgoode Hall with the portraits of those judges who have been appointed Chief Justices, the custom shall be restricted to the portraits of such judges as shall hereafter be appointed Chief Justices of Ontario.

Mr. Martin gave notice that he would, on the 12th instant, move a rule to rescind the rule passed on 2nd instant, increasing the salary of one of the assistants.

## FRIDAY, 12TH SEPTEMBER.

Present—The Treasurer and Messrs. Murray, S. H. Blake, L. W. Smith, Read, MacLennan, Crickmore, Morris, Bethune,

Moss, J. F. Smith, Cameron, Hoskin, Foy, Martin, Irving, Ferguson.

Mr. Murray, from the Reporting Committee, presented the following report, viz. :—

#### TRINITY TERM, 1884.

The Committee on Reporting beg leave to report as follows :—

1. The work done by the reporters since last term is satisfactory, but there is still considerable arrear in Chancery which the reporters of that Division are doing their utmost to bring out.

2. The Committee regret that the digest is not yet published, but they are assured that it will be ready in another fortnight.

3. The Committee have communicated with Mr. O'Brien and Mr. Armour, and these gentlemen will both be willing to publish early notes of cases on the terms expressed in the resolution, adopted by Convocation in the event of that resolution being adhered to, but Mr. O'Brien considers that the existing resolution of Convocation is very unjust to him.

All which is respectfully submitted.

(Signed) JAMES MACLENNAN,  
Chairman.

12th September, 1884.

The report was adopted.

Mr. Murray moved, pursuant to leave, that the rule amending rule 119 (2), which was read a first time on the 2nd instant, be now read a second and third time. Carried.

The rule was read a second and third time.

Mr. Hoskin, seconded by Dr. Smith, moved, and it was

*Ordered*, That Mr. C. R. Irvine be called upon for an immediate explanation touching the advertisement inserted by him in a local newspaper in the following words :

"C. R. Irvine, M.A., Barrister-at-Law, successor to L. U. C. Titus, Esq. Special attention to all business. Notes and mortgages bought. Collections promptly attended to. Wills, deeds, mortgages and contracts drawn at moderate rates. Money to loan—terms to suit. In all matters charges fair. Mr. L. U. C. Titus will complete the business of his former clients and remain in the office ;"

Mr. Titus therein named having been struck off the rolls.

## REPORTS.

### ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

#### MASTER'S OFFICE.

#### TRINITY COLLEGE V. HILL.

*Opening foreclosure—Subsequent interest—Interest on costs—Mortgagee's costs of writs of fieri-facias.*

Where a foreclosure is opened and the time extended for the payment of the mortgage money, subsequent interest is computed on the aggregate amount of principal, interest and costs found due by a decree or by a Master's Report.

Taxed costs carry interest from the date of taxation ; and in taking accounts under an order for redemption in a mortgage case, the mortgagee is entitled to interest on such costs, and also to the costs of writs of *fi. fa.* issued to enforce payment.

[Mr. Hodgins, Q.C.—October 14.]

This was a reference to take account in a mortgage case where the foreclosure was re-opened. The case is reported in 2 O.R., 348 and *ante* p. 262.

*Vankoughnet*, Q.C., for plaintiffs.

*Bain*, Q.C., for defendants.

THE MASTER-IN-ORDINARY — In this case the Court of Appeal, reversing the judgment of Boyd, C., 2 O.R., 348, has allowed the defendants to redeem the mortgaged premises "on payment into Court of principal money, interest and costs, and subsequent interest and subsequent costs." The question discussed before me was whether this subsequent interest is to be computed on the aggregate amount of principal, interest and costs found due by the decree of the 14th of November, 1877, or only on the principal sum secured by the mortgage.

The judgment of the Court of Appeal leaves this decree untouched, but re-opens the foreclosure and gives the defendants further time to redeem on the terms above stated.

The cases on the question show what is the rule where the amount is ascertained by the Master's Report, and they appear to be consistent. In *Butler v. Duncomb*, 1 P. Wms., 453, Lord Chancellor Parker stated that a mortgagee "by getting reports of the money due might make his interest principal, as it must be after the report is confirmed." And in *Brown v. Barkham*, 1 P. Wms., 652, he said : "It is true a Master's Report computing interest makes that interest principal, and to carry interest ; for a report is a judgment of the Court."

The observations of Lord Loughborough in *Crense v. Hunter*, 2 Ves. jr. 157, are to the same

Master's Office.]

TRINITY COLLEGE V. HILL.

[Master's Office.]

effect: "In the case of a mortgage the ground is plain. The estate belongs to the mortgagee, it is forfeited; the owner comes here to redeem; the Court orders payment on such a day, and that he shall then redeem. He lets that time elapse; of course he shall pay interest."

The House of Lords in *Kelly v. Lord Bellew*, 4 Bro. P.C., 495, varied a decree of the Irish Court of Chancery where there had been delay in carrying it out, by directing a computation of interest in a mortgage case on the whole sum found due by the Master's Report, on which the decree had been made, instead of on the principal money secured by the mortgage. In a note to the case it is stated that, "a stated account ought to carry interest, especially in case of a mortgage, and more strongly when settled by a Master of the Court pursuant to order."

In *Bruere v. Wharton*, 7 Sim., 483, the following note of the practice in Exchequer was cited to Sir L. Shadwell, V.C., who made an order in similar terms: "After the report of principal, interest and costs on mortgage, and time enlarged, with order to compute subsequent interest; this subsequent interest shall be computed on the aggregate reported sum of principal, interest and costs, and not on the principal only; and agreed the practice in Chancery to be the same."

The subsequent cases, up to the late case of *Elton v. Curteis*, 19 Ch. D. 49, show a slight variation in the practice, but not an alteration of the rule. In *Wharton v. Cradock*, 1 Keen, 267, Lord Langdale, M. R., after reviewing some of the cases, states the variation in the practice thus: "The time for paying what is found due on the mortgage is enlarged upon payment of the interest and costs found due; and the subsequent interest on the principal only, and subsequent costs, are directed to be computed and taxed."

The same learned judge is more explanatory in *Brewin v. Austin*, 2 Keen, 212: "The practice formerly was not to order any immediate payment but to order subsequent interest to be computed on principal, interest and costs already ordered. For many years past, however, the practice has been to enlarge the time only on terms of first paying the interest and costs already reported; and these being paid, subsequent interest is to be computed on the principal only—that remaining unpaid. If for any special reason the Court should think fit to enlarge the time without ordering any immediate payment, I conceive it would now be proper to order the subsequent interest to be computed on the aggregate amount of principal, interest and costs before computed."

In *Holford v. Yate*, 1 K. & J. 677, the form of

order in that case shows the terms on which the foreclosure was opened—one of which was that the interest should be calculated on "the aggregate amount found due to the plaintiff."

*Whitfield v. Roberts*, 7 Jur. N. S. 1268, does not seem to be consistent with these decisions, nor with the subsequent case of *Elton v. Curteis*, 19 Ch. D. 49.

In this latter case the reason for the alteration in the practice was referred to during the argument; and in giving judgment Fry, J., quoted the words of Lord Hardwicke, in *Bickham v. Cross*, 2 Ves. Sr. 471, that: "Where a mortgagor came to redeem, and a mortgagee to foreclose, and afterwards there is a report computing what is due for principal, interest and costs, all that is considered as one accumulated sum;" and that as to mortgagees "the compound sum carries interest." And then, after referring to the distinction between the modes of computing subsequent interest in foreclosure and other actions, the learned judge states that subsequent interest in mortgage cases should be computed on the whole amount found due for principal, interest, and costs, and that such was the ordinary practice and was a "well established and old practice of the Court."

These cases show that a Master's Report when confirmed becomes a judgment of the Court. But in this case the amount of principal, interest and costs was ascertained by a decree which is unquestionably a judgment of the Court; and, therefore, in computing the "subsequent interest" allowed to the plaintiffs by the Court of Appeal in this case, I must hold that the direction in *Bruere v. Wharton*, 7 Sim. 483, and similar cases applies: that such subsequent interest is to be computed on the aggregate amount of principal, interest and costs found due by the decree of the 14th of November, 1877, and not on the amount of the principal secured by the mortgage.

As the Court of Appeal has given the plaintiffs their taxed costs of the hearing before the Chancellor, they are entitled to interest on these costs from the date of taxation and also the costs of any *fi-fas* issued to enforce payment *Schroeder v. Cleugh*, 46 L. J. Q. B. 365.

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JENNINGS V. NAPANEE BRUSH COMPANY.

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## COUNTY COURT OF YORK.

(Reported for the CANADA LAW JOURNAL.)

## JENNINGS V. NAPANEE BRUSH CO.

*Promissory note—Instalments of interest—Protest.*

When a note payable in eighteen months contained a condition for the payment of interest half-yearly, held that notice of dishonor was necessary in order to charge endorser, where maker made default in payment of an instalment of interest.

*Semble.*—That interest is not a mere incident of the debt when payable by a term of the contract.

[McDOUGALL, Co. J.—October 13.]

The plaintiff was the holder of a promissory note, and brought his action against the makers of the note and John Stevenson, an endorser, to recover two instalments of interest alleged to be due in respect of the note. The note was in the following words:—

\$4,290. NAPANEE, 19th April, 1882.

Eighteen months after date the Napanee Brush Co. promise to pay to the order of G. M. Elliott the sum of \$4,290, at the Dominion Bank here, with interest at the rate of seven per cent. per annum, payable half-yearly, value received.

Signed, NAPANEE BRUSH CO.,

per D. T. Preston, President.

and endorsed by defendant Stevenson, and others.

The action was commenced by the plaintiff in July, 1883, against the parties to recover \$310.82, that being the amount of the two first half-yearly instalments of interest, then overdue by the terms of the same. While this action was pending, the note matured and was duly protested and proper notice of dishonor given to all the endorsers, and a second action was brought to recover the principal sum of \$4,290 and the last half-yearly instalment of interest. Judgment was duly recovered against all parties, including the defendant Stevenson, for these two latter-named sums. Execution was issued upon that judgment, and the amount realized from Stevenson, who defends this action.

McDOUGALL, Co. J.—The defences on the record—set up by Stevenson—are: (1) *Non-fecit*; (2) That note was not duly presented for payment of the instalments of interest sued for in this action; (3) That he, the defendant, received no notice of dishonor, nor of non-payment of the instalments of interest sued for.

The defences relied upon are the neglect of presentment, and the failure to give notice of dishonor. The case is somewhat unique, for after the most diligent search I have been unable to find any English or Canadian authorities upon the pre-

cise point, and the learned counsel engaged assure me that the result of their examination of the books has been equally fruitless.

Is a note dishonoured by the non-payment of interest, where, by the contract, interest is made payable at certain fixed periods, which periods are to occur before the time fixed for the payment of the principal sum?

*Orridge v. Sherborn*, 11 M. & W. 374, is an authority deciding that a note, the principal of which is payable in instalments, is within 3 & 4 Anne, cap. 9, so as to be assignable, and that the same should be protested on the maturity of each instalment, and that days of grace should be allowed with each instalment. *Corlow v. Kenealy*, 12 M. & W. 139, decides that a note payable by instalments is within the statute of Anne, although it contains a provision that upon failure of payment of one instalment, the whole debt is to become due and payable.

*Brooks v. Mitchell*, 9 M. & W. 15, is to the effect that a promissory note payable on demand, *with interest*, cannot be treated as overdue so as to affect an endorsee with any equities against the endorser merely because it is endorsed a number of years after its date, and no interest has been paid on it for several years before such endorsement.

The plaintiff contends that interest is a mere incident of the debt, and the failure to pay or demand the same at the stated periods in no wise dishonors the bill or note.

I have been able to find some American cases which would appear to sustain this view.

In Daniels on negotiable instruments (3 Ed.), the learned text-writer at page 737 (vol. 1), states: "The weight of authority is to the effect that the *bona-fide* purchaser for value of negotiable paper is within the protection of the law merchant, although interest is overdue and unpaid at the time of purchase, interest being a mere incident of the debt, and the holder losing no right as against the parties, whether makers or endorsers, by failing to demand it. This," he says, "seems to be the correct rule, though the contrary view is not without some weighty consideration."

I will refer now to some of the cases cited in support of this statement.

*Kelley v. Whitney*, 45 Wis. 110 (1878). In this case the Court approved of and followed the earlier case of *Boss v. Hewitt*, 15 Wis. 260. In the latter case Mr. Justice Paine, delivering the opinion of the Court, said: "Neither do we think that the fact that the interest had not been paid makes the case equivalent to a purchase after maturity so as to let in defences that might have been made against the original parties. The interest is a mere inci-

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dent of the debt, and although it is frequently provided that it shall be paid at stated periods before the principal falls due, we know of no authorities holding that a failure to pay it dishonors the note so as to let in all defences against subsequent purchasers for value without any other notice of defects except the mere fact that such interest has not been paid; and we do not think it should have that effect. The maturity of the note within the meaning of the commercial rule on the question is the time when the principal becomes due."

*Boss v. Hewitt* is also approved in *National Bank of North America v. Kirby*, 108 Mass. 497 (1871), and the latter case is cited with approval, and its general doctrines affirmed in *Cromwell v. County of Sac*, 96 U. S. 51 (1871).

In the *National Bank v. Kirby* the following language occurs in the judgment of COLT, J.:—"Interest is an incident of the debt and differs from it in many respects. It is not subject to protest and notice to endorsers, or days of grace, according to the law merchant. Interest is not recovered on overdue interest, and the Statute of Limitations does not run against it until the principal is due. The holder of the note, with interest payable annually, loses no rights against the parties to it, whether makers or endorsers, by neglecting to demand it, and he has the election to do so or wait and collect it all with the principal." The learned judge adds further in another part of his judgment: "There is a large class of negotiable securities, the principal of which is payable only at the end of many years, but with interest payable either annually or semi-annually, and many of the notes given in the purchase of real estate and secured by mortgage, especially in the country, are of this class, as are most of the obligations for debts contracted by public, and many of those incurred by private corporations; and it is important that the value due to their negotiable character should not be impaired by new rules tending to lessen their currency and credit."

See also Bigelow on Bills and Notes (2 Ed.) 445.

I find in the case of *Newell v. Gregg*, 51 Barbour 263, an authority for the opposite view, and in that case it was expressly held that the payment of the interest at the fixed period was as much a part of the agreement as the promise to pay the principal, and that the effect of non-payment of the interest was to dishonor the note. This case is cited in the case of *Cromwell v. County of Sac*, 96 U. S., but is not commented on.

From the foregoing cases it may be concluded that the rule in the United States, as affirmed by high authority, is that the non-payment of an instalment of interest, payable by the tenor of the

contract, and expressed on the face of the note, before the date fixed for the payment of the principal will not amount to a dishonor of the note, and that as between subsequent holders for value without notice, and the endorsers, such non-payment cannot be relied upon even where there has been no presentment or notice of dishonor. That presentment and notice of dishonor is wholly unnecessary, and that, notwithstanding the default, the original liability of the parties is preserved.

It was argued before me that under the case of *Orridge v. Sherborn*, 11 M. & W. 374 which is the authority for protesting and giving notice of dishonor at the maturity of each instalment of a note, the principal money secured by which is payable in instalments, the payment of an instalment of interest was equally within the authority of that case. That an instalment of interest payable at a fixed date was to all intents and purposes equivalent to an instalment of principal. There certainly does appear to be a close analogy, but if the American cases decide rightly, that interest is a mere incident of the debt, "the natural growth" of the money, even when payable by an express term of the contract, then doubtless the defence set up here should fail.

But is interest a mere incident of the debt within our own or the English authorities? With a certain propriety, interest may be said always to be an incident to the principal; not only when it is part of the contract, but also when it is allowed as damages. In the former case it is however not strictly an incident or rather it is more than an incident. There must be a principal sum; but after interest has accrued it is no longer dependant on the principal; it does not necessarily follow it. (*Crouse v. Park*, 3 U. C. R. 458, *Hudson v. Fawcett*, 2 D. & L. 81, *Watkins v. Morgan*, 6 C. & P. 661.) Conventional interest is of itself a debt, and payment of the principal alone will not affect the right to recover the interest, and yet it is so allied to the principal, that if the latter is recovered without the recovery of the interest when not secured by a separate instrument, it is barred; not because the interest cannot exist as a valid demand distinct from the principal; but because demands arising upon one agreement for principal and interest due to the same party at the same time cannot be divided, and each made the subject of a separate action. In that respect there is no difference between principal and interest. An action brought for one would bar both, whether included in the claim or recovery or not. But such interest made payable before the principal is due may be sued for in an action for that alone if brought before the principal is due; and if sued for before the

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maturity of the whole debt, it is really sued for as a part of the debt accrued due.

Can there, then, be said to be any difference between an instalment of interest payable by a term of the contract, and an instalment of the principal itself payable in the same manner?

It seems to me that it is highly inconsistent to say that an action may be maintained for an instalment of interest each six months, and that the endorser shall be charged with it, without demand on the maker, and notice of his failure to pay; and to say that as to the payment of the principal, in say eighteen months, the endorser shall be discharged, unless duly demanded and he is given proper notice of dishonor. Surely the contract of the endorser is the same with reference to each instalment, whether principal or interest. Is not his contract the following?—The maker of this note has promised to pay you, the holder, at particular times and occasions, certain sums of money (call them principal or interest as you will), and I undertake that if he fails to pay you, and you promptly notify me of the fact, I will pay you.

If the stamp act were in force the interest accruing during the eighteen months which this note had to run would have to be computed, and duty paid upon the whole sum or debt represented by the one contract. The interest here is not a penalty, or damages, it is debt, and, in my opinion, just as much so as the principal sum secured by the note.

The American cases referred to by me in support of the opposite view, are, I think, not to be followed. They are due to a line of decisions upon the question of interest, which are admittedly at variance with the principles maintained in a number of English authorities. Mr. Sedgewick, in his work on damages, very clearly points out the distinction between the American and English authorities. "There is," says the author, "considerable conflict and contradiction between the English and American cases on this subject. But as a general thing it may be said, that while the tribunals of the former country restrict themselves generally to those cases where an agreement to pay interest can be proved or inferred, the courts of the United States on the other hand have shown themselves more liberally disposed, making the allowance of interest more nearly to depend on the equity of the case, and not requiring either an express or implied promise to sustain the claim. The leading difference seems to grow out of a different consideration of the nature of money. The American cases look upon the interest as the necessary incident, the natural growth of the money, and therefore incline to give it with the principal, while the English treat it as something distinct and independent, and only to

be had by virtue of some positive agreement." (Sedg. (6 ed.) 473.)

In Van Rensselaer (2 Barb. S. C. R. 643), Mr. Justice Willard, at pp. 666, says: "Whatever may be the rule in England, interest in this country is not considered as a demand distinct from, and independent of, the original debt, and resting solely upon contract, express or implied. It is treated rather as an incident to the debt, always payable when there is a promise, express or implied, to pay it, and in numerous instances when no such promise can be inferred."

Referring again to the cases cited by me in support of the plaintiffs' contention, *The National Bank v. Kirby* was an action against a maker only, who claimed that the non-payment of the interest dishonored the bill, and that the plaintiff in that action, taking the bill with interest unpaid, took it subject to all the equities. *Kelly v. Whitney* was an action also against joint makers only, who set up the same defence as in last case.

*Boss v. Hewitt* was also against a maker who claimed the benefit of the same defence as in last two cases, alleging the notes had been obtained from him by fraud.

Suppose the whole debt in this case, principal and interest, had been secured by several notes endorsed by the defendant, one promising to pay the amount of six months' interest, naming the dollars and cents in six months from the date of the note; in another note the same amount in one year; in another note the same amount in eighteen months; and in another note the principal sum in eighteen months. Could recovery be had against the defendant endorser upon these notes without demand and notice of dishonor? As against the endorser, I do not think the plaintiff is to have any greater benefit by reason of the whole contract being on one piece of paper promising to pay the interest half-yearly.

I think therefore the plaintiff's action should be dismissed with costs.

## RECENT ENGLISH PRACTICE CASES.

## RECENT ENGLISH PRACTICE CASES.

## MACDONALD V. THE TACQUALE GOLD MINES COMPANY.

*Ont. r. 370—Imp. O. 45, r. 2, (1875).*

*Garnishee order—Debt due to judgment debtor and another jointly.*

The debt, legal or equitable, owing by a garnishee to a judgment debtor, which can be attached to answer the judgment debt, must be a debt due to such judgment debtor alone, and where it is only due to him jointly with another person it cannot be so attached.

[L. R. 13 Q. B. D. 535.]

BOWEN, L. J., was there any debt (including by that word "debt" both a legal and equitable one) owing or accruing from the defendant company to the judgment debtor which was capable of being attached by a garnishee order? Can it be said that a debt due to two persons jointly is a debt due to one of them? Before the Judicature Act such a question would, as it seems to me, have been unarguable. Where money is due on a covenant made with two persons jointly by which it is to be paid to such two jointly, no one of those two has any right to that money without the other of them. What difference in this respect can the Judicature Acts have made, for they do not give any right which did not previously exist but only another mode of procedure. It is clear that there was no debt due to the judgment debtor . . . when this order to attach was sought for, but only a sum due to him jointly with another, and therefore not a sum capable of being attached.

## THE LONDON LAND COMPANY V. HARRIS.

*Ont. r. 392—Imp. O. 49, r. 1, (1883).*

*Transfer of action—Counterclaim for specific performance.*

In an action by purchaser of land against vendor for return of deposit, the defendant counter-claimed specific performance.

*Held*, that the action ought to be transferred to the Chancery Division.

[L. R. 13 Q. B. D. 540.]

POLLOCK, B.—It is admitted by the counsel for the plaintiffs, that by the practice of the Court of Chancery the judgment of the Court in favour of a party claiming specific performance can only amount to this, viz.: that all conditions have been fulfilled, and all things have been done and happened necessary to entitle him to specific performance, subject however to an inquiry into the title. That inquiry this Division has no machinery for making. This renders applicable the cases cited, in which it was

held that where the Division in which the proceedings arose has no sufficient machinery for administering the necessary relief, there is good ground for making the transfer.

[NOTE.—*Quare*, whether section 63, Ontario Judicature Act, 1881, which makes all masters in Chancery official referees, read in connection with section 47 does not render this decision inapplicable to our practice.]

## CROPPER V. SMITH.

*Ont. r. 474—Imp. r. 320, (1883).*

*Amendment—Patent action—Defendant's particulars of objection.*

[L. R. 26 Ch. D. 700.]

This was an action brought against S. and H. to restrain alleged infringements of a certain patent. In their particulars of objection as delivered, S. and H. denied infringement, and S. objected to the validity of the patent on the ground of want of novelty. The Court of Appeal held, reversing the Court below, that the patent was invalid for want of novelty, and S. having succeeded on this objection was entitled to judgment. But they held that as H. had not delivered objections to the validity of the patent, but only denied infringement, evidence that it was invalid for want of novelty could not be read on his behalf; and, moreover, that as H. had never asked for leave to amend his particulars of objection, but had to the last argued the case on the ground that no such amendment was necessary since the denial of infringement included an objection by implication that the patent was invalid (which was over-ruled), leave to amend ought not to be now given, but his appeal must be dismissed.

[NOTE.—It may perhaps be a question whether the clause at the end of our Rule 474, which is not found in the English rule, would not prevent this decision being followed under similar circumstances in our Courts.]

## ROBERTS V. OPPENHEIM.

*Ont. r. 221, 229—Imp. r. 356, 357, (1883).*

*Production of documents—Documents referred to in pleadings—Privilege.*

Where a party claims privilege against the production of documents on the ground that they support his own title and do not relate to that of his opponent, his affidavit must be taken as conclusive, unless the Court can see from the nature of the case or of the documents that the party has misunderstood the effect of the documents.

*Attorney General v. Emerson*, L. R. 10 Q. B. D. 191, distinguished.

## RECENT ENGLISH PRACTICE CASES—NOTES OF CANADIAN CASES.

[Com. Pleas.]

The privilege claimed for documents is not lost merely by their being referred to in the pleadings. The penalty for non-production is that they cannot afterwards be used in evidence.

[L. R. 26 Ch. D. 724.]

In this case the defendant obtained the usual order for production. In their affidavits made therein, similar affidavits being made by each plaintiff, they objected to produce certain documents on the ground that "they relate exclusively to my title and that of some of my co-plaintiffs, and do not prove or tend to prove that of the defendant." Some of these documents, production of which was refused, had been referred to in the plaintiffs' claim.

The defendants took out a summons to consider the sufficiency of the plaintiffs' objections to discovery.

KAY, J., refusing to make any order on the summons, the defendants appealed.

COTTON, L.J.,—It is said that the plaintiffs cannot avail themselves of a claim to protection, because they have referred to the deed in their pleadings, and Rule 357 (Ont. R. 229) is relied on. But that rule only says that if a party will not produce a document to which he has referred in his pleadings, he shall not afterwards be at liberty to put such document in evidence. That is the penalty. He may prefer to lose part of his claim rather than produce the document. In my opinion, that rule does not take away the privilege of the documents, but only prevents them from being put in evidence unless produced.

FRY, L.J.,—I am of the same opinion.

[NOTE.—In his judgment, KAY, J., comments at length on the extraordinary nature of the provision in Rule 357 (Ont. R. 229), which draws a distinction between the position of the plaintiff and defendant in refusing to produce documents referred to in his pleadings. He confesses he is not "at present fully able to understand" this part of the rule, but avoids passing an opinion upon its effect and meaning as unnecessary to the application before him.]

# WHEELER V. THE UNITED TELEPHONE COMPANY.

Imp. O. 30, r. 1. (1875)—Ont. r. 215.

*Payment into court without admitting liability.*

In an action for trespass in breaking and entering the plaintiff's land, the defendants paid money into court under the above rule, and in their defence denied the plaintiffs' possession of the land, and also stated that, without admitting any kind of liability, the sum paid into court was sufficient to satisfy any damage which the plaintiff might have sustained in consequence of any acts of theirs. The plaintiff joined issue upon these defences but failed at the trial to establish

any damages exceeding the sum paid into court, though he succeeded on the other issue. The Court of Appeal treated such defence of payment into court as an alternative defence, and as it went to the whole cause of action,

*Held*, that the defendants were entitled to judgment.

[L. R. 13 Q. B. D., 597.]

BRETT, M.R.—Payment into court is allowed to be pleaded as an alternative defence; it is a defence to the action, in the sense that if it succeeds, the action is defeated. Whatever the exact form of the defence may be in words, the substance of it is that the money is paid into court, and the defence is pleaded as an alternative defence, which means, that if the defendant fails in the other defences which he has set up, this is his defence to the action. If it succeeds, the result is the same as if under the old system of pleading—the jury had found in favour of one plea which went to the whole cause of action. In that case there would be verdict and judgment for the defendant, but the plaintiff would be entitled to the costs of the issues raised by the other alternative defences which had failed, I am of opinion, therefore, that there ought to be judgment for the defendants.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

## COMMON PLEAS DIVISION.

Osler, J. A.]

[October 17.]

### DOUGLAS V. HUTCHINSON.

*Married woman—Dower—Separate estate.*

A married woman, married to her present husband in 1871, was entitled to dower in land of which her former husband died seized, and was living thereon with her husband and children working it, but her dower had never been actually set apart or assigned.

*Held*, that this was separate estate, with reference to which she could contract debts, or which she could contract to sell or dispose of, and that it could therefore be sold under a *fi. fa.* on a judgment recovered on a promissory note made by her.

*Shepley*, for the plaintiff.

*W. H. P. Clement*, for the defendant.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

## CHANCERY DIVISION.

Ferguson, J.]

[Sept. 16.]

## TOWNSHIP OF ELDERSLIE V. VILLAGE OF PAISLEY.

*Municipal law—New municipality—Liability to share of debts created by old municipality—36 Vic. c. 48, s. 56 O.—R.S.O. c. 174, s. 55.*

36 Vic. c. 48, s. 56 O. (R.S.O. c. 174, s. 55), provides, that upon an incorporated village being created out of a portion of an existing municipality, "all special rates for the payment of debts theretofore imposed upon the locality by any by-law of the former corporation, shall continue to be levied by the new corporation, and the treasurer of the new corporation shall continue to pay over the amount as received to the treasurer of the senior or remaining municipality, and the latter shall apply the money so received in the same manner as the money received under the same by-law (*i.e.*, the by-law of the senior municipality which created the debt in question) in the senior or remaining municipality."

In this case the township of Elderslie in 1873 passed a by-law for issuing debentures to raise \$6,000 for purposes of a school section, in part comprised in it, and providing for payment of interest, and creation of a sinking fund, and levying of the necessary special rate in the property of the school section.

In 1874 the village of Paisley was incorporated out of a portion of the township of Elderslie, being a portion of the said school section. During the currency of the debentures, and after the incorporation thereof, the corporation of Paisley collected their share of the money required to pay the interest and raise the sinking fund, but they paid over the same to the secretary and treasurer of the school board instead of to the treasurer of the township of Paisley. In 1883 the said secretary and treasurer died, and it was found he had converted the said sinking fund money to his own use, but had left no assets to make good the theft.

In the same year the debentures fell due, and the township of Elderslie paid them, and now sued the village of Paisley for its *pro rata* portion thereof.

*Held*, that the plaintiffs were entitled to judgment, except as to sums levied and received

by the defendants more than six years before action brought, for the defendants should have paid the moneys over to the treasurer of the plaintiffs' corporation, and even if there had been a positive agreement by and with the township of Elderslie that the money should be paid to the secretary-treasurer of the school section, this would have made no difference; for such an agreement would have been *ultra vires* the township of Elderslie, and void as contrary to the statute law, while the sections of the Municipal Act of 1873 relating to arbitrations in cases of separations of incorporated villages from townships, did not apply in this case, so as to prevent the action lying.

*Held*, also, that even if it was impossible to make the judgment productive, on the ground that the defendants could not now levy and collect the money, this was no reason why the plaintiffs should not obtain judgment: *Frontenac v. Kingston*, 30 U.C.R. 594 distinguished.

*Cassels*, Q.C., and *O'Connor*, for the plaintiffs.

*C. Moss*, Q.C., and *Shaw*, Q.C., for the defendants.

Ferguson, J.]

[October 18.]

## ROSS V. MALONE.

*Execution—Fi. fa. lands—Sale by sheriff before return nulla bona—R. S. O. c. 66, s. 14, 15.*

*Held*, under the circumstances of this case that a sale under a *fi. fa.* against lands conferred a good title on the purchaser, although the *fi. fa.* against goods had not been returned *nulla bona* under R. S. O. c. 66, s. 15. The want of a return *nulla bona* before the sale of the lands were only an irregularity, and not fatal to the validity of the sale. It appeared the sheriff would have returned the writ *nulla bona* if called upon to do so; that the judgment debtor had no goods in the county during the currency of the writ against goods, and that the plaintiff endeavouring to set aside the sale, being a mortgagee, would, if he had made the proper searches, have found the writ against lands in the sheriff's hands.

*Lount*, Q.C., for the plaintiff.

*Pepler*, for defendant W. Boys.

*Lennox*, for defendant Giffin.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Boyd, C.]

[October 22.]

## DONALD V. DONALD.

*Will—Construction—Maintenance of infants—Reference—Practice.*

A testator willed as follows: "I give, devise and bequeath to my executors and executrix" (of whom one was the plaintiff, the testator's widow), "all my real and personal property of every kind whatsoever for the benefit of my children, share and share alike, and to my wife while she continues my widow, and I give to my said executor and executrix power to sell any part or the whole of my real property for the support and maintenance of my children and my wife while she remains my widow."

*Held*, on action brought by the widow, that under the above will, she and the children took the real and personal property jointly, she during widowhood, and they share and share alike absolutely. She did not take an immediate estate in the whole with reversion to her children, as contended.

*Held*, also, a reference might be directed, similar to that in *Maberley v. Morton*, 14 Ves. 499 to ascertain whether it would have been reasonable and proper in the trustees to apply any or what part of the land, having regard to the situation and circumstances of the children, to their support and maintenance, and declaring the sum which the Master should find to have been properly expended by the mother in part maintenance to be a charge upon the inheritance of the children respectively in the land.

*Walkem*, for the plaintiff, Jane Donald.

## PRACTICE.

Mr. Hodgins, Q.C.]

[June 7.]

## HUGHES V. REES.

*Estoppel—Pleading—Jurisdiction of Master—Indemnity to trustee under a void trust deed—Husband and wife—Agency—Maintenance of Children.*

Where a party does not plead a prior judgment in bar by way of estoppel before the entry of a judgment directing a reference to the Master-in-Ordinary, he waives it, and

leaves the whole matter at large to be enquired into on the evidence.

The Master has no jurisdiction to make amendments to the pleadings after judgment, nor could he give leave to file a statement in his office raising a defence which ought to appear in the pleadings.

It is incident to the office of a trustee that the trust property shall reimburse him for his expenses in administering the trust, and a clause so indemnifying a trustee is infused into every trust deed; and the statute R. S. O. ch. 107, sec. 3, does little more than what Courts of Equity have been accustomed to do without any statutory direction.

Therefore a trustee, who had been induced by a settlor to accept a trust under an instrument void by the law of the settlor's domicile is entitled to be reimbursed by such settlor for all his expenses incurred in the execution of the trust.

The defendant's wife, who had been supported by the plaintiff with the defendant's consent, returned to her husband's home, but was turned out of the house by him, whereupon the plaintiff again took charge of and supported her.

*Held*, that the defendant by turning his wife out of his house sent her forth as his delegated agent to pledge his credit for the necessities of life suitable to her position, and that the plaintiff was therefore entitled to assert a claim against the defendant for his expenses in so supporting the defendant's wife; and that such claim could be maintained up to the date of a judgment allowing alimony to the defendant's wife.

Where a father whose children are maintained by another, and who could have obtained possession of their persons by *habeas corpus*, allows them to be so maintained, he is liable for their support and maintenance to the person in whose care such children are.

*S. H. Blake*, Q.C., and *G. Morphy*, for plaintiff.  
*MacLennan*, Q.C., and *Kingsford*, for defendant.

Mr. Dalton, Q.C.]  
Rose, J.]

[June 20.]  
[July 2.]

## OGDEN V. CRAIG.

*Interpleader—Intended seizure.*

Upon an interpleader application by the Sheriff of Bruce, it was sworn that the sheriff

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

intended to seize certain chattels in the possession of the execution debtor, but was unable to do so because they had before the writ of execution was placed in the sheriff's hands passed into the possession of the claimant, a chattel mortgagee of the judgment debtor, and that the claimant refused to produce them, and claimed them in his own right.

The interpleader application was refused with costs.

*Alan Cassels*, for the sheriff.

*H. J. Scott, Q.C.*, for the execution creditor.

*Clement*, for the claimant.

Osler, J. A.]

[Sept. 23.]

IN RE MERCHANTS' BANK V. VAN ALLEN.

*Prohibition—Division Court—Jurisdiction.*

In an action on a promissory note brought in a Division Court, M., the endorser, was made a defendant by the order of the judge of the Court, and was served by the original defendant, the maker of the note, with a notice claiming relief over and indemnity, but was not served with the summons or a copy of the plaintiffs' demand. M. filed a notice disputing the defendant's claim against him, and the jurisdiction of the Court to try it, and also appeared at the trial, and gave evidence and objected to the jurisdiction. Judgment was given for the plaintiffs against both the original defendant and M.

Upon motion by M. for prohibition, *held* that judgment could not have been given against M. in his absence, because the writ of summons and statement of claim had not been served upon him; but *held*, that by appearing in the suit and taking proceedings both before and at the trial, M. had waived service of the summons and demand.

Prohibition refused.

*E. Douglas Armour*, for the motion.

*D. M. Christie*, contra.

Mr. Dalton, Q.C.]

[Oct. 11.]

WRIGHT V. LEYS.

*Notice of appeal—Time for service.*

A notice served on Monday, the 6th of October, of an appeal to the Court of Appeal

from a judgment given on the 4th of September, was set aside as irregular.

*J. Ruttan*, for motion.

*Walter Read*, contra.

Osler, J. A.]

[Oct. 13.]

QUEEN V. DILLON.

*Stakeholder—Conviction—40 Vict. (Can.) ch. 31.*

The Act 40 Vict. (Can.) c. 31, intituled "An Act for the Repression of Betting and Pool Selling," does not apply to stakeholders in any of the three cases mentioned in section 2 of the Act.

*Fenton*, for the Crown.

*T. C. L. Armstrong*, for the prisoner.

M. O.]

[October 14.]

TRINITY COLLEGE V. HILL.

*Opening foreclosure—Subsequent interest—Interest on costs—Mortgagee's costs of writs of fieri facias.*

A Master's Report when confirmed becomes a judgment of the Court.

Where a foreclosure is opened and the time extended for the payment of the mortgage money, subsequent interest is computed on the whole amount of principal, interest and costs found due by a decree or by a Master's Report. Taxed costs carry interest from the date of taxation, and in taking accounts under an order for redemption in a mortgage case the mortgagee is entitled to interest on such costs and also to the costs of writs of *fi. fa.* issued to enforce payment.

Mr. Dalton, Q.C.]

[Oct. 15.]

WILSON V. RODGER, MACLAY & CO.

*Service of writ—Partnership.*

Motion to set aside service of the writ of summons.

*Held*, that the defendants were properly sued in their firm name, the cause of action having arisen before, but the writ of summons having issued after the dissolution of the firm.

Motion refused.

*George Bell*, for the motion.

*Urquhart*, contra.

Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Osler, J. A.] [October 21.]

WILSON V. RODGER, MACLAY &amp; CO.

OSLER, J.A., affirmed the order of the Master-in-Chambers *supra*.

George Bell, for the appeal.

Urquhart, contra.

Hodgins, Q.C.] [Oct. 18.]

O'BRIEN V. WELLS.

*Notice of trial—No place mentioned—Irregularity.*

H. J. Scott, Q.C., moved on notice to set aside notice of trial as irregular upon the ground that the notice of trial did not state the place where the trial was to take place. The notice of trial read in this way: "Take notice of trial of this action at the sittings of this court for the 20th day of October next." It was admitted that the statement of claim showed the place of trial to be at the town of Stratford.

Holman, contra.

THE MASTER refused to set aside the notice of trial unless it was shown by affidavit that the plaintiff, upon whom notice of trial was served, had been misled, and as this was not shown, motion was dismissed as to this ground.

Osler, J. A.] [Oct. 20.]

LAY V. ALEXANDER.

*Final interpleader order—Sheriff's costs.*

On appeal by a sheriff from the order of the Master-in-Chambers striking out so much of a former order as awarded the sheriff his costs of appearing on a motion made by the claimant. In a final interpleader order barring the execution creditor for default in giving security for costs.

Held, that the sheriff was properly served with notice of such motion and was entitled to his costs thereof.

Appeal allowed and the later order of the Master rescinded.

Clement, for the sheriff.

George Kerr, for the claimant.

Shepley, for the execution creditor.

Osler, J. A.] [October 21.]

REGAN V. WATERS.

*Appeal from Surrogate Court—Costs.*

Held, upon an appeal from one of the taxing officers, that the costs of an appeal from a Surrogate Court to the Court of Appeal should be taxed on the scale of the Court appealed from as provided by Rule 28 of the Court of Appeal, and not on the scale of County Court appeals.

Holman, for the appeal.

Davidson, contra.

Boyd, C.] [Oct. 22.]

MARTENS V. BIRNEY.

*Motion for judgment—Length of notice—Chy G. O. 418—Rule 407 O. J. A.*

A motion for judgment was made to the Court by the plaintiff upon two clear days' notice of motion, the defendant having appeared, but having filed no defence.

It was objected by the defendant that seven days' notice of motion should have been given under Chy. G. O. 418.

Held, that Chy. G. O. 418 is controlled by the conflicting provision of Rule 407, O. J. A., and that the two days' notice of motion was regular.

Cavell, for the plaintiff.

Masten, for the defendant.

Boyd, C.] [October 22.]

DAWSON V. MOFFATT.

*Solicitor's lien for costs.*

An action for an account in the nature of a partnership account.

By the terms of the judgment pronounced at the trial costs up to the hearing were to be paid to the plaintiff out of the fund in Court, a reference was directed to take the accounts, and further directions and subsequent costs were reserved.

By the report of the officer to whom the reference was directed, the plaintiff was found indebted to the estate in a considerable amount.

A motion was made by the defendant Moffatt (pending an appeal from the Report),

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

to stay payment out of Court of the costs of the plaintiff up to the trial, until after the hearing, on further directions in order that the amount found due to the estate by the plaintiff might be set off *pro tanto* against the costs awarded to the plaintiff.

*Held*, that the judgment pronounced at the trial gave the plaintiff and his solicitor a vested right to be paid out of the fund in Court prior to the defendant's equity to ask a set off, and no set-off should be allowed to the prejudice of the solicitor's lien thus arising. A solicitor's lien having been asserted at the bar during the argument, an affidavit proving it was allowed to be put in subsequently, following the suggestion of STRONG, V. C., in *Webb v. McArthur*, 4 Ch. Ch. R.

*Wallace Nesbitt*, for defendant Moffat.

*Ruttan*, for the other defendants.

*Arnoldi*, for the plaintiff.

Boyd, C.]

[Oct. 22.]

#### HOLDEN V. SMITH.

*Settling minutes — Judgment clerk — Rule 416, O. J. A.*

On the 30th June the Chancellor, on the application of the defendant, gave an *ex parte* direction under Rule 416, O. J. A., to have the minutes of a judgment pronounced by him at Chatham settled by one of the judgment clerks at Toronto. The local registrar at Chatham had on the 25th June previously settled the minutes. Subject to the objection of the defendant who then gave notice that he required the minutes to be settled at Toronto, and judgment for the plaintiff, and execution was afterwards issued by him, but these facts were unintentionally, not disclosed to the Chancellor when he gave the direction.

Upon a motion by the plaintiff to set aside the Chancellor's *ex parte* direction and a cross motion by the defendant to have the judgment settled by the Registrar at Toronto.

*Held*, that the entry of judgment did not preclude the party who stated his desire to have the minutes settled at Toronto from afterwards obtaining that reference.

The Court will rather encourage (at all events, for some time), the settling of judgments, such as are not included in the forms, at the head office, because of the well-under-

stood phraseology in use by the two officers whose official function it is to settle the frame and terms of such judgments.

*E. D. Armour*, for the plaintiff.

*Langton*, for the defendant.

Osler, J. A.]

[October 28.]

#### DARLING V. SMITH.

##### *Absconding Debtors' Act—Priorities.*

On the 25th January, 1884, seven warrants of attachment at the instance of different plaintiffs, were issued out of a Division Court against the goods of the defendant, an absconding debtor, and under these warrants the bailiff seized certain goods. Subsequently; and on the same day, a writ of attachment was issued by the plaintiff in this suit against the defendant as an absconding debtor, and the goods seized by the bailiff were delivered up by him to the sheriff, pursuant to section 16 of the Absconding Debtors' Act. Five other Division Court attachments, and one County Court attachment, were afterwards issued. Judgments were recovered by all the attaching creditors, executions were issued in the suits in the Superior and County Courts, and the clerk of the Division Court furnished the sheriff with a certified memorandum of the judgments in that Court by virtue of which each creditor mentioned in it was entitled for the purpose of sharing in the proceeds, to be treated as a plaintiff who had obtained judgment and sued out execution. Pending this suit an order was made for the sale of the goods attached under the writ, and the goods were sold and the proceeds of the sale paid into Court.

Upon a motion for distribution of the moneys in Court, the plaintiffs claimed payment of their costs of suit in priority to all other claims.

It was ordered that the costs of issuing the plaintiffs' writ, and the fees and charges paid to the sheriff for executing it should be paid first out of the fund, because these costs and charges were necessarily incurred in seizing, recovering and preserving the property, and that any fees which had been incurred in the Division Court in issuing the warrants of attachment on the 25th January, and seizing the property and holding it till it was delivered to

Prac.]

NOTES OF CANADIAN CASES—LAW STUDENTS' DEPARTMENT.

the sheriff should also be paid out of the fund, and also the costs of the order directing the sheriff to sell, and the costs of this application, and that after payment of these charges the fund should be distributed rateably among the creditors.

*Aylesworth*, for the plaintiffs.

*Holman*, contra.

Osler, J. A.]

[Oct. 28.]

## IN RE GUY V. GRAND TRUNK RY.

*Acquiescence in jurisdiction—Prohibition—Division Court—Foreign corporation.*

The defendants, a foreign corporation, having their head office in Montreal, and not residing or carrying on business in this Province (as held in *Re Ahrens v. McGilligat*, 23 C. P. 171, and *Re Westover v. Turner*, 26 C.P.), were sued by the plaintiff in the first Division Court of the united counties of Northumberland and Durham, within the jurisdiction of which the cause of action arose. The summons was served upon the local station agent of the defendants at Bowmanville. No notice disputing the jurisdiction was given by the defendants until the trial of the cause, when counsel appeared on their behalf and objected to the jurisdiction of the Division Court because the defendants resided out of the Province. The judge of the Division Court overruled the objection, and proceeded to try the case, the defendants' counsel cross-examining the plaintiff's witnesses and addressing the jury. The amount of the claim was admitted and judgment was given for the plaintiff.

The defendants then moved for prohibition.

*Held*, that the service on the defendants was a nullity. *Held*, also, that these defendants cannot be compelled to appear to a summons issued against them in an ordinary Division Court action, because no means have been provided for effecting service upon them in such an action.

But *held*, that the defendants had precluded themselves by their appearance and conduct at the trial from objecting to the jurisdiction on account of the absence of power to compel their appearance, and the Court having jurisdiction over the cause of action as to its

locality, nature and amount, prohibition ought to be refused.

*Aylesworth*, for the defendants.

*Holman*, for the plaintiff.

Boyd, C.]

[October 29.]

## ANGLO-AMERICAN V. ROWLIN.

*Security for costs—Meritorious defence.*

The local Master at Hamilton, on the application of the plaintiff, set aside a *præcipe* order for security of costs, the plaintiff swearing, and the defendant not denying, on affidavit that the defendant had no good defence to the action. In a letter written by the defendant to the plaintiff, the former said, "My note for \$750 (the note sued on) in your favour is due on the 24th. You will kindly give me another month . . . when it will be paid in full."

Upon appeal to a judge in Chambers, *Held* that the defendant had no right to compel the plaintiff to give security for costs unless he had a defence on the merits, and that the failure to answer the affidavit of the plaintiff, and to explain the admissions in his letter, warranted the conclusion that he had no defence.

*Bank of Nova Scotia v. La Roche*, 9 P. R. 903, dissented from and *Winterfield v. Bradman*, 3 Q. B. D. 325, and *Du St. Marten v. Davis*, 28 Sol. J. 392, W. N. 1884, p. 86, followed.

*Watson*, for the appeal.

*William Bell*, contra.

## LAW STUDENTS' DEPARTMENT.

## LAW SOCIETY.

## EXAMINATION QUESTIONS.

## TRINITY TERM :

## FIRST INTERMEDIATE.

*Equity.*

1. Distinguish between the effects of constructive notice on the one hand, and mere want of caution on the other, and illustrate each by an example.
2. Illustrate by an example the maxim that Equity looks upon that as done which ought to have been done.

## LAW STUDENTS' DEPARTMENT

3. Illustrate by two examples the change wrought by the Statute of Frauds as to the creation of trusts of real estate. Let one example show the mode in which such trusts might have been created before the statute, and the other show the mode which must be adopted since the statute.

4. State the only modes in which, apart from legislative enactment, a trustee may be relieved of the burden of his trust.

5. Discuss the right of a *cestui que trust* to follow the trust estate, which by virtue of a breach of trust has come to the hands of a third person.

6. Explain what is meant by the maxim "once a mortgage always a mortgage," and show how this conflicts with the common law maxim *modus et conventio vincunt legem*.

7. Explain the principle upon which the marshalling of assets is founded.

## HONORS.

1. "While recognizing the rule of law, and even founding upon it and maintaining it, a Court of Equity will, in a proper case, get round about, avoid, or obviate it." Illustrate this passage by an example.

2. *Qui prior est tempore, potior est jure*. Explain the meaning of this maxim, and illustrate its application by an example.

3. Give a state of facts in which there will arise a resulting trust of an unexhausted residue.

4. State shortly the rights which, under the old common law, a husband acquired in the property of his wife, and the obligations under which he acquired the same; and state the extent to which (apart from statutory enactment) the Courts of Equity refused to recognize such common law rights.

5. Discuss the right of executors to carry on the trade of their testator: (1) where there is no reference thereto made in the will; (2) Where the will directs them so to do. And discuss the right of creditors arising from such trading to recover their claims: (1) as against the executors; (2) as against the estate.

6. Distinguish between a mortgage and a sale with right of repurchase: (1) as to the form of the transaction; (2) as to the different consequences resulting therefrom. State the circumstances which will generally guide one in deciding under which of these classes a given transaction will fall.

7. State the modes in which (apart from legislative enactment) a married woman may acquire equitable separate estate; and state shortly her power of disposing thereof, (a) by conveyance, (b) by incurring debts; (1) as to her separate personality, (2) as to her separate realty.

*Broom's Common Law, and O'Sullivan's Government in Canada—Honors.*

1. In what cases, and under what circumstances, may an executor be sued for a tort committed by the testator?

2. If one maker of a joint and several promissory notes give to the holder a mortgage to secure the amount, and therein covenants to pay it, is the other maker discharged on the ground of merger of the simple contract debt in the specialty? Give reasons.

3. A man purchases a lamp for the use of his wife from the manufacturer, who warrants it to be properly constructed: by reason of its improper construction, it explodes and injures the wife. Can she maintain an action against the manufacturer? If not, state what additional facts would require to be proved to support her action, and give reasons.

4. Explain briefly, and in general terms, what amount of personal inconvenience inflicted by one person on another is sufficient to constitute a nuisance which the Court will restrain.

5. What difference does it make, as to the presumption of the wife's agency for the husband in purchasing goods, whether they are living together or apart?

6. The driver of an omnibus drives into another omnibus while both are on their ordinary route. Is the proprietor of the first omnibus liable for the damage done to the other, (a) if it was done purposely, from some spite which one driver had against the other, (b) if it was done through careless driving on the part of the driver of the first omnibus. Reasons.

7. What Courts in Ontario (if any) have the right to refuse to give effect to a Dominion Act on the ground that it is *ultra vires*?

**LITTELL'S LIVING AGE.**—The numbers of *The Living Age* for Oct. 18th and 25th contain: The Younger Pitt as an Orator, *National Review*; The Philosophy of John Inglesant, *Modern Review*; Lord Lyndhurst, *London Quarterly Review*; Sport and Travel in Norway, *Fortnightly Review*; The Darwinian Theory of Instinct, *Nineteenth Century*; Ralph Bernal Osborne, and On the Reading of Books, *Temple Bar*; The Sanatorium of the Southern Ocean, *Cornhill*; Modern Cathedrals, A Small-pox Camp, and Gambling on Atlantic Boats, *St. James' Gazette*; Book-selling in Russia, *Spectator*; Raphael as an Architect, *Academy*; Moorish Ambassador in Spain, *Athenæum*; Curious Newspapers, *Chambers' Journal*; with "Mr. Pudster's Return," "The Hermit of Saint-Eugene," and instalments of "At Any Cost," and poetry.

A new volume began with the number for Oct. 4th. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price (\$8) is low: while for \$10.50 the publishers offer to send any one of the American \$4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

# Canada Law Journal.

VOL. XX.

NOVEMBER 15, 1884.

No. 20.

## DIARY FOR NOVEMBER.

16. Sun.....23rd Sunday after Trinity. Wilson, J., Q.B., and Gwynne, J., C.P., 1868.  
17. Mon.....Michaelmas Sittings, Com. Law Div. H. C. J., begin.  
18. Tues.....Hagarty, C.J., sworn in, Ct. of Q.B., Wilson, J., sworn in Ct. of C. P., 1878.  
19. Wed.....Princess Royal born, 1840.  
23. Sun.....24th Sunday after Trinity.  
25. Tues.....Lord Lorn, Governor-General of Canada, 1878.  
27. Thur.....Cameron, J., sworn in Q.B., 1878.  
30. Sun.....Advent Sunday. Moss, J., appointed C. J. of Appeal, 1877.

TORONTO, NOVEMBER 15, 1884.

MR. JOHN M. HAMILTON, Q.C., of Sault Ste. Marie, who has been gazetted Judge for the Provincial Judicial District of Thunder Bay, has gone to Port Arthur to assume the duties of his office. The appointment is an exceedingly good one. In addition to his high personal character and legal abilities he has had a long experience in "frontier law," which will be of great benefit in a place rapidly rising into importance, and where meet the civilization of the older provinces and the ruder energies of a younger country of unlimited capacity and of vigorous growth requiring much strong practical common sense in those who direct its development. Mr. Hamilton was called to the Bar in Mich. Term, 1853, and after practising for some years in Toronto was in May, 1861, appointed Crown Attorney and Clerk of the Peace for the District of Algoma.

THE *Weekly Notes* for October 18th, 1884, contains some supplemental rules of court, to be cited as rules of the Supreme Court, October, 1884. Amongst them is the following which seems specially notice-

able, and might, probably with some advantage, be adopted in this country:—

## ORDER L. 1A.

11. Whenever an application shall be made before trial for an injunction or other order, and on the opening of such application, or at any time during the hearing thereof, it shall appear to the Judge that the matter in controversy in the cause or matter is one which can be most conveniently dealt with by an early trial, without first going into the whole merits on affidavit or other evidence for the purposes of the application, it shall be lawful for the Judge to make an order for such trial accordingly, and to direct such trial to be held at the next or any other assizes for any place, if from local or other circumstances it shall appear to him to be convenient so to do, and in the meantime to make such order as the justice of the case may require.

TIMES are dull apparently in Western Canada. A person who, we must assume, is a member of our honourable fraternity (he has evidently mistaken his vocation) thus advertises himself:

M. SULLIVAN,

POSTMASTER, SARNIA, ONT.,

Issuer of Marriage Licenses, no witnesses required,

BARRISTER, ETC.

Office at Post-office, Sarnia.

It is evident that this enterprising party, living as he does at a frontier town, and apparently able to dispense with witnesses in vending his licenses, desires to provide a Gretna Green for Ontario. Being a professional man he will be able to advise the amorous flitters on various legal points which may be of interest to them, and doubtless they would in return see a propriety in paying a fee which could not be collected by process of law by his fore-runner, the historical blacksmith.

## THE CANADA TEMPERANCE ACT, 1878.

**THE CANADA TEMPERANCE ACT,  
1878.**

Now that the noise of the advancing chariots of the temperance men sounds loud in our ears, some mention of a matter which has recently been brought prominently before our notice in connection with the so-called Scott Act may be excused, and the more so as public attention has been lately called to this Act in connection with a special case laid before the Supreme Court at Ottawa by the Government, and argued a few days ago, to which we shall presently allude more fully.

The Canada Temperance Act, 1878 (41 Vict. c. 16), nowhere points out or provides any method for securing the proper carrying out of the preliminary steps directed by the Act to be taken by those who desire the bringing into force of the second part of it in any given municipality. For example, sec. 5 provides that the preliminary petition and notice to the Governor-General-in-Council shall be signed "by electors qualified to vote at the election of a member of the House of Commons in the county or city;" sec. 6 provides that the petition and notice shall have appended to it "the genuine signatures of at least one-fourth in number of all the electors in the county or city named in it;" sec. 8 for the insertion of the proclamation of the Governor-General-in-Council so many times in the Canada Gazette and the Provincial Gazette; and sec. 9, sub-sec. 2, that no polling of votes under the Act shall take place on the same day as an election in the same locality for members to serve in the Parliament of Canada and the Local Legislature; and there are a number of other requirements intended doubtless by the Legislature to secure that the second part of the Act, if brought into force in any given locality shall be so brought into force by the undoubted desire of the majority of those qualified to vote. But when one comes

to enquire what resort the defeated party would have in the event of these preliminary requirements not having been complied with, and nevertheless a return made to the Secretary of State of a majority being in favour of the second part being brought into force, and an Order-in-Council consequently ensuing calling it into force, he does not find any course pointed out. Sec. 70 indeed enacts that "No polling of votes under this Act shall be declared invalid by reason of a non-compliance with the rules contained in this Act as to the taking of the poll . . . if it appears to the tribunal having cognisance of the question that the polling of votes was conducted in accordance with the principles laid down in this Act, and that such non-compliance or mistake did not affect the result of the polling;" but there is nothing to show what is the tribunal referred to. It will scarcely be denied by the most ardent spirits, or rather by the most inveterate haters of ardent spirits, that the second part of the Act, be it a wise piece of legislation or not, is a very grave and serious infringement of the liberty of the subject, and presses very hardly on that majority of persons who do know how to take their "liquor like gentlemen," and are not prone to excess,\* besides being a serious blow to the vested interests of many; and, probably, all on reflection would admit that it is most desirable that the requirements of the Act should be very exactly carried out before the second part is brought into force. It, therefore, seems somewhat strange that no method of securing this is provided by the Act. No doubt it is open to any one who considers that the preliminary steps have not been regularly taken to petition the Governor-General-in-Council not to proclaim the Act in force, but this can scarcely be called an adequate remedy. It has, how-

\* But, we might add, who do not see any responsibility to give up their liberty for the good of others.—Ed. C.L.J.

## THE CANADA TEMPERANCE ACT, 1878.

ever, been held that sec. 111, which prohibits a *certiorari*, does not take away the right of proceeding by way of *certiorari* where there is a total want of jurisdiction, and one of our main objects in now writing is to call renewed attention to a decision of Mr. Justice Armour of some years back, which we believe attracted considerable attention at the time, but has unfortunately up to the present never been reported.

Sec. 111 enacts that "No conviction, judgment or order, in any such case, shall be removed by *certiorari* or otherwise into any of Her Majesty's Superior Courts of Record." Without dealing with the various decisions in the books as to the meaning of "in any such case" in this section, we would point out that *Rég. v. Alexander*, which we believe has never been impeached (and of which, by the courtesy of the officials of the Queen's Bench Division, we are able to give a full report in this issue), shows that the right of *certiorari* is not taken away where there has been a total want of jurisdiction in the convicting magistrate, owing to the second part of the Act never having been legally and validly brought into force. We believe that at the time the opinion of eminent counsel was taken as to whether an appeal from this decision would be likely to succeed, but that was emphatically in favour of the soundness of the judgment. We may also call attention to the subsequent decision in the Supreme Court of New Brunswick in *ex parte Hackett*, 21 New Bruns. 513, where it was held that the right of *certiorari* under sec. 111, is not taken away where there is an excess or want of jurisdiction, and hence the recognition of *certiorari* in sec. 118 is not inconsistent with the prohibitory words of sec. 111. It might have been thought, indeed, and would appear to have been urged before Mr. Justice Armour, that after the Governor-General-in-Council had proclaimed

the Act in force, it would be too late to move to quash a conviction under it, on the ground that it had not been brought into force. *The Queen v. Alexander* shows the contrary.

At the commencement of this article we alluded to the recent special case before the supreme Court. Sec. 6 of the Canada Temperance Act, 1878, provides that the notice required by sec. 5 to be sent to the Secretary of State of the desire of the signers that the votes of the electors be taken for or against the adoption of the petition must be deposited in the office of the Sheriff or Registrar of deeds of or in the County for public examination, and evidence of such deposit sent to the Secretary of State, with the notice prescribed in sec. 5. In the case of the County of Perth, the notice was deposited with the Registrar of the North Riding only. Thereupon a petition was sent to the government praying that under these circumstances, no proclamation under sec. 7, *seq.*, should be issued by the Governor-General-in-Council. The Governor-General-in-Council thereupon referred the following special case to the Supreme Court:—

There are two Registrars of deeds for the County of Perth, in the Province of Ontario; one for the North Riding, with an office at Stratford, and one for the South Riding with an office at St. Mary's. With a notice and petition for bringing the second part of 'The Canada Temperance Act, 1878,' into force in the said County, there was laid before the Secretary of State evidence that such notice and petition was deposited, for the purpose and time required, in the office of the Registrar of deeds for the North Riding of the said County.

Is that a compliance, in that respect, with the requirements of the sixth section of the said Act?

The case was argued on October 28th last. Hon. R. W. Scott, Q.C., appeared on behalf of the supporters of the proceedings that had taken in reference to the Act in the county, and Mr. C. Robinson, Q.C., for the objectors. The following note of what took place, and of the judgment of

THE CANADA TEMPERANCE ACT, 1878—THE QUEEN V. ALEXANDER.

] Q. B. Div.

the court, is from the *Globe* newspaper of October 29th last:—

Mr. Scott argued that the intention of the Legislature had been fulfilled. When the petition was filed in the one registry office, it was filed in a registry office within the county. Had the petition been filed in the sheriff's office there would have been no question about its being a legal filing, and the sheriff's and registrar's offices were but a few feet apart.

Chief Justice Ritchie—Then why in the name of common sense, was it not filed in the sheriff's office?

Mr. Scott argued that the convenience of the electors had been fully considered.

Mr. Justice Henry—Why should a man be compelled to travel outside his riding, or away from his registry office, in order to examine such petitions.

Mr. Scott pointed out that a petition lodged in the registry office at L'Original, in the County of Prescott, would be valid for the County of Russell.

Mr. Robinson replied briefly.

Chief Justice Ritchie, in giving judgment, said, that in such an important matter, involving the right of a certain class of persons, it was important that every provision of the law should be strictly complied with. This, he held, had not been done. The petition might have been deposited either in the sheriff's office, or in both the registry offices. He held that the filing in the one registry office was insufficient.

Mr. Justice Strong said there could be only one construction of the Act, and no argument could be advanced to sustain the validity of the filing. He was only surprised that it had been found necessary to resort to this court to obtain a decision upon such a question.

The other justices concurred.

A. H. F. L.

## CANADA REPORTS.

## ONTARIO.

(Reported for the LAW JOURNAL by A. H. F. LEFFROY,  
Barrister-at-Law.)

## QUEEN'S BENCH.

## THE QUEEN V. ALEXANDER.\*

*Canada Temperance Act, 1878—Non-compliance with preliminary requirements—Day of voting—Certiorari—Conviction—Jurisdiction—41 Vict. c. 16, D. secs. 9, III.*

Where the requirements of the Canada Temperance Act, 1878, as to the day of voting on the petition had not been properly complied with, *held*, on *certiorari*, that a conviction under it must be quashed, although the Act had been proclaimed in force by Order-in-Council.

[June 1, 1881.—Armour, J.]

This was a proceeding by way of *certiorari* to quash a conviction under the Canada Temperance Act, 1878 (41 Vict. c. 16 D.) The circumstances were as follows:—

A proclamation of the Governor-General-in-Council was issued under the above Act for the purpose of putting to the vote the adoption of a petition of certain electors of the County of Lambton for the bringing into force the second part of the Act, and May 29th, 1879, was fixed therein as the day on which the vote was to be taken (*Canada Gazette*, May 10, 1879).

It so happened that by proclamation of the Lieutenant-Governor of Ontario the same day had been fixed for holding the election for the Legislative Assembly for the West Riding of the County, and the said election accordingly commenced on that day, candidates being nominated, and a poll demanded and granted.

Sec. 9, sub-sec. 2 of the Act provides that "No polling of votes under this Act shall be held in any city, county or district, on the same day that any election may take place in such city, county or district for members to serve in the Parliament of Canada or in any of the Local Legislatures of the Dominion."

Nevertheless the voting under the proclamation of the Governor-General took place, and a majority being in favour of the adoption of the petition, the second part of the Act was, by Order-in-Council of June 12th, 1880, declared to be in force (Statutes of Can. 43 Vict. p. cxlviii, *Canada Gazette*, Vol. 13, p. 1,745).

\* See *Supra* p. 374.

Q. B. Div.]

THE QUEEN V. ALEXANDER—MERCHANTS' BANK V. MONTEITH.

[Master's Office.]

On May 12th, 1881, the Mayor of Sarnia convicted Alexander of unlawfully selling liquor contrary to the Act, and fined him \$50 and costs.

Mr. James F. Lister, counsel for the defendant, raised the following objection, but was over-ruled by the Mayor :—

"I submit that you, as Mayor or otherwise, have no power or jurisdiction to entertain, try, or adjudicate upon the alleged offence upon which the defendant is charged because the Canada Temperance Act, 1878, under which the information herein is laid is not lawfully in force in the County of Lambton by reason of the polling of votes under the said Act having been taken in the county on the same day that an election of a member to serve in the Legislative Assembly for Ontario was opened and commenced by the nomination of candidates, and in support of my objection I beg to refer you to sec. 9, sub-sec. 2, which provides that no polling under the Act shall take place on the day on which any election may take place in any county for members to serve in the Parliament of Canada, or in any of the Local Legislatures of the Dominion. I submit that the 29th day of May, 1879, was the election day for the West Riding of Lambton within the meaning of the Ontario Elections' Act, R. S. O. c. 10, sec. 26 and following sections. That it was a day on which an election might have been held, and at all events it was the opening and commencement of an election. For these reasons this prosecution should be dismissed."

The matter coming up on *certiorari* before ARMOUR, J., on May 25th, 1881, he granted a rule *nisi* calling on the informant and Mayor to show cause why the conviction should not be quashed "on the ground that the Mayor had no jurisdiction to hear or determine the said charge, the Canada Temperance Act, 1878, not being legally in force in the said County of Lambton by reason of the polling of votes under the said Act having been held in the said county on the same day that an election of a member to serve in the Legislative Assembly of the Province of Ontario took place."

On June 1, 1881, *C. Robinson, Q.C.*, moved the rule absolute.

*J. Bethune, Q.C.*, contra.

ARMOUR, J., made the rule absolute to quash the conviction.

His Lordship delivered an oral judgment. The following is a report of his remarks taken from the *Globe* newspaper of June 3rd, 1881 :—

His Lordship, then, in delivering judgment, said : "That it seemed to him quite clear that the proceedings in connection with the polling were irregular, and he might as well dispose of the matter at once, so that if either party desired they

could take it at once before the full court, which would still be sitting for several days. For myself I have no doubt that the conviction should be quashed. I think the nomination day is the day upon which an election might take place, and that being so, the polling on that day, under the Temperance Act is prohibited, and it is just as if no such polling had taken place at all. As to the next objection raised in opposing this motion, that the Governor-in-Council had issued a proclamation which is final, I do not think he has any authority to move or dispense with preliminaries required by the Act. Dealing with a case of this kind I cannot say that anything the Governor-General might have done could vary the provision of this Act. He has to act as authorized by the Legislature, and there is nothing in the statutes giving him power to waive the provisions. The rule will, therefore, be absolute to quash the conviction."

Mr. Bethune requested that the rule which would issue should set out the grounds upon which the conviction was quashed as the matter would again be submitted to the Lambton people.

His Lordship said that certainly the rule might issue in that form. He thought it was a rather unfortunate circumstance that a matter like this should be disallowed on such technical grounds.

#### MASTER'S OFFICE.

(Reported for the CANADA LAW JOURNAL.)

#### MERCHANTS' BANK V. MONTEITH.

*Imp. Act 38, Geo. 3, c. 87—R. S. O. c. 40, ss. 34 and 35, c. 46, s. 32—Infant administrator—Nullity—Suits by an infant—Liability for costs.*

The 6th sec. of 38 Geo. 3, c. 87 (*Imp.*), prohibiting the grant of probate to infants under the age of twenty-one, is in force in Ontario, either as a rule of decision in matters relating to executors and administrators (R.S.O. c. 40, ss. 34, 35), or as a rule of practice in the Probate Court in England (R.S.O. c. 46, s. 32.)

An infant cannot lawfully be appointed administrator of an estate, and therefore a grant of probate or of letters of administration to an infant is void, and confers no office, and vests no estate in such infant.

An infant had been appointed administrator of an estate, and various suits had been brought in his name on behalf of such estate.

*Held*, that being an infant he was incapable of bringing suits in his own name, or of making himself, or the estate he assumed to represent, liable for the costs of such suits.

Sections 37 and 38 of the Surrogate Act (R.S.O. c. 46) protect parties *bona fide*, making payments to an executor or administrator, notwithstanding any invalidity in the probate or letters of administration; but they do not protect payments made to third parties by an infant assuming to act as administrator of the estate.

[Mr. Hodgins, Q.C. Sept. 29.]

Master's Office.]

MERCHANTS' BANK V. MONTEITH.

[Master's Office.]

*Ras*, for plaintiffs.

*J. A. Paterson*, for creditors.

*Black*, for infant.\*

*J. Macgregor*, for defendant Pritchard.

THE MASTER-IN-ORDINARY.—In this case the executors named by the testator renounced probate, and the Surrogate Court granted letters of administration with the will annexed to the defendant, Monteith, who, as appears by the evidence taken in this matter, was then, and still is, an infant under the age of twenty-one years.

The administration order directs the usual accounts of the dealing of the infant defendant with the assets of the estate; and in proceeding to account for such assets this defendant has brought in accounts showing the payment of nearly the whole assets of the estate to a solicitor for the purposes of litigation.

During the proceedings before me this solicitor claimed to act for and represent this infant defendant without the usual and necessary appointment of a guardian *ad litem*; and he contended before me that such payment of the bulk of the assets of the estate to him, as solicitor for this infant, was rightful, and he relied on *re Babcock*, 8 Gr. 409, as warranting the action of this infant defendant in so doing. The official guardian being unable to attend for this defendant, I appointed Mr. Black to act as his guardian *ad litem*.

It must be to ordinary minds difficult to perceive how an apparent authority to retain \$200 on account of costs which the report showed had been incurred to a larger amount can be cited to warrant an administrator handing over \$3,385.78, nearly the whole cash assets of the estate, to a solicitor within a few months of his appointment for the purposes of litigation, and without any bills of costs or other evidence of the necessity of such payment. But such claim is made and such argument is strenuously advanced in this case.

In view of this contention it is proper to consider whether the letters of administration granted to the infant defendant are voidable or void. Since the payment to the solicitor, and during the proceedings in this office, the grant of letters has been revoked by the Surrogate Court, and administration *durante minore etate*, has been granted to the defendant Pritchard.

The statute (Imp.) 38, Geo. 3, c. 87, s. 6, enacts: "And whereas inconveniences arise from granting probate to infants under the age of twenty-one; be it enacted that where an infant is sole executor, administration with the will annexed, shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have obtained the full age of

twenty-one years, at which period, and not before, probate of the will shall be granted to him."

In a note to *ex parte Sergison*, 4 Ves. 147, it is stated that the circumstances of that case had considerable effect in producing the above Act of Parliament. The M.R. in that case would not permit an infant, though he was an executor, to receive the money of the estate, and in his judgment he intimated that the legislature should forbid the ecclesiastical court granting probate to an infant.

In *Hindmarsh v. Southgate*, 3 Russ. 324, it was argued that "an infant could not be lawfully clothed with the character of administrator;" and the court refused to direct an account against an infant who had been appointed administratrix.

In *re Cunha*, 1 Hagg 237, the court adopted the Portuguese law, and granted limited administration to a minor. But that case was not followed in similar applications to appoint minors as administrators. In *re Manuel*, 13 Jur. 664, Sir H. Jenner-Fust declined to give effect to the law of Turkey; and in *re Duchesse d'Orleans*, 7 W.R. 269 when Sir C. Cresswell declined to recognize the law of France—adding, that in this country a minor could not take upon himself the liabilities which the law casts upon an administrator.

It is further stated: "a minor cannot be administrator because he cannot execute the bond which is required by the Act of Parliament, or rather because the authority of the administrator is derived from the statute Edw. 3, which must receive a legal construction, and therefore the administrator must be of age according to the common law, which is twenty-one:" *Dodd & Brookes Prob. Pr.* 404.

And in 1 Williams, on Executors, 231, it is said: "If an infant be appointed sole executor he is altogether disqualified from exercising his office during his minority."

A similar disqualification exists in the United States.

In *Carow v. Mowatt*, 2 How. N.Y. 57, the Vice-Chancellor said: "On account of the incompetency of infants to bind themselves by bond, or to render themselves liable to account, for property which may come into their hands during minority, they cannot lawfully be appointed to fill the office of administrator. If, through mistake or inadvertence, the appointment has been conferred upon an infant, it may be revoked by the Surrogate Court." And in *Collins v. Spears*, Walk. (Miss.) 310, the Court held that it was error in a Probate Court to grant administration to a minor, although such minor was the widow of the deceased; and they revoked the letters of administration.

The negative words in the English statute pro-

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MERCHANTS' BANK v. MONTEITH—NOTT v. GORDON ET AL.

[Div. Ct.]

hibit the granting of probate to an infant, and therefore must be construed as taking away any jurisdiction which the Probate Court might have previously had to make such grants: Dwaris on Statutes 743.

The Imperial Act, whether classed as prescribing "a rule of decision in matters relating to executors and administrators" (R.S.O. c. 40, ss. 34, 35), or "a rule of practice in the Court of Probate in England" (R.S.O. c. 46, s. 32), is in force in Ontario. See also *Grant v. Great Western Ry. Co.*, 7 C.P. 438; 5 U.C.L.J. 210; *In re Thorpe*, 15 Gr. 76.

These references show that the grant of letters of administration to this infant against the negative mandatory words of the statute was a nullity, and conferred no office, and vested no estate in him, as administrator with the will annexed.

There is evidence that various suits have been brought in the name of this infant as administrator, and that others have been brought against him in respect of this estate, and a claim is made that the costs of such suits should be allowed in his accounts.

If the letters of administration are void *ab initio*, this infant defendant has been dealing with the estate as a stranger, and his acts will not bind the estate. On this, and other grounds, I see no authority for allowing such costs. In Mitford on Pleading, p. 25, it is said: "An infant is incapable by himself of exhibiting a bill, as well on account of his supposed want of discretion as his inability to bind himself, and to make himself liable to the costs of the suit." The case there cited is *Turner v. Turner*, 2 Stra. 708, where Lord King, L.C., held, that by the common law an infant could give no pledges; that the power of infants to sue by *prochein ami*, was introduced by the stat. Westminster 2nd; and he held that no case had been cited where an infant had been obliged to pay costs, either at law or in equity.

And in Macpherson on Infants, p. 361-2: "If judgment had been given against an infant in an action to which he has appeared by attorney, that is error, upon which the judgment would be reversed; for the same reason a judgment upon a warrant of attorney given by an infant is liable to be vacated, and a warrant of attorney by an infant to confess judgment is absolutely void, and the courts cannot in any case make it good." "The incapacity of an infant and a *non compos* run parallel." *Hume v. Burton*, 1 Ridgw. P.C. 89, 100, 203.

No cases have been cited to me to sustain the claim made in respect of these costs, and, therefore, I must, on the authorities referred to, hold that the grant of administration was void, and that the defendant, being an infant, was incapable of bringing

suits in his own name, or of making himself, or the estate he assumed to represent, liable for the costs of the extensive litigation in which he appears to have been a party.

The solicitor is not technically a party to these proceedings, and the report, therefore, while it will lay the facts brought out in evidence before the court, will be no adjudication as to him.

Sections 57 and 58 of the Surrogate Act, R.S.O. c. 46, are intended as a protection to parties *bona fide*, making payments to an executor or administrator, notwithstanding any invalidity in the probate or letters of administration, but they have no application here, nor do they protect the payment of the moneys of the estate made by this infant to the solicitor in this case.

## IN THE THIRD DIVISION COURT OF THE COUNTY OF ONTARIO.

NOTT v. GORDON ET AL.

*Action against arbitrators to recover back fees paid upon an invalid award.*

No action will lie against arbitrators to recover back fees paid for an award which afterwards turns out to be invalid by reason of a defect in the mode of execution on the grounds, (1) that, no fraud or collusion being alleged, such action could not be maintained for neglect or negligence, their functions being judicial; (2) that such action is against public policy; and (3) that the fees having been paid voluntarily could not be recovered back.

[Whitby, Oct. 15.]

This was an action against the defendants, of whom two were the arbitrators appointed, one by each of the parties, in a matter of dispute between the present plaintiff and one Mr. W. J. Nott, and the third was the other arbitrator appointed by these two.

They entered upon the reference and took evidence at some length and unanimously made an award in the plaintiff's favour, the latter taking it up and paying the arbitrators' fees, amounting to the sum of \$60.

The present plaintiff brought an action on this award which was dismissed, the Court of Common Pleas holding *Nott v. Note* (5 Ont. R. 283), that the award was invalid because it was not jointly, and on one occasion, executed by the three arbitrators.

The plaintiff now brings this action to recover back the fees paid by him; in effect alleging that there was a failure of consideration, he having paid his money for an award which was of no avail to him.

DARTNELL, J.J.—I think the form of action is founded upon a fallacy. There is no implied con-

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NOTT V. GORDON ET AL.—RECENT ENGLISH PRACTICE CASES

tract on behalf of an arbitrator that his award should hold water—the action is really for damages, for neglect in making such an award as could be enforced. If the defendants are liable to repay these fees they are also liable for the costs the plaintiff has been put to in endeavouring to enforce the award—and what he now sues for is only part of his damages.

I can find no authority which would make an arbitrator liable in such an action. If an arbitrator fraudulently, or corruptly, or collusively, or dishonestly took a course which he ought not to have taken, no doubt an action would lie against him (*per DENMAN, J., Stevenson v. Watson*, 4 L. R., C. P. D., 161). But nothing of the kind is alleged against these defendants. I have never heard of a case where, when an award has been set aside for the misconduct of an arbitrator, the latter was held liable to refund the fees paid to him: much less where he honestly exercised his judgment, and endeavoured to embody such judgment in a document which unfortunately was invalid by reason of a technical defect.

In the case cited above, Lord Coleridge says (page 159):—"Where the exercise of judgment or opinion on the part of a third person is necessary between two persons, such as a buyer and seller, and, in the opinion of the seller, that judgment has been exercised wrongly, or improperly, or ignorantly, or negligently, an action will not lie against the person put in that position when such judgment has been wrongly or improperly, or ignorantly, or negligently exercised."

Now, the most that can be said against these defendants is that they ignorantly or negligently omitted a formality necessary to give effect to the award they intended to make. I think the authority I have cited is conclusive against the plaintiff's right to recover.

It seems to me also, that, on grounds of public policy, an action like this should be discouraged. Arbitrators are a *forum*, a tribunal erected or created by the parties themselves, and the functions performed by an arbitrator become thereby judicial. In such case no suit would lie against him for acts of omission or commission. The Courts have always encouraged resort to such tribunals; and, if it were established that an arbitrator, after devoting his time, thought, skill and judgment in respect of the matters referred to him, was liable to refund the *honorarium* he had earned, because, through some error of form, his award could not be enforced, it would be difficult indeed to persuade any one to accept the position with such a liability attached. The defendants here were laymen, and the award was drawn up by the present

plaintiff's solicitor. It seems to me that it was his duty to see that it was correctly executed. The decision in *Nott v. Nott* was somewhat of a surprise to the profession, and the Court reluctantly held against the validity of the award.

There is another ground which I think disentitles the plaintiff to recover in this action, namely, that having voluntarily and without compulsion paid these fees to the defendants, he cannot now recover them back. Moneys paid under a mistake of fact can be recovered back; not so when paid under a mistake of law. The plaintiff believed the award to have been properly executed, the best evidence of which is that he brought an action to enforce it after he had become aware of the mode of its execution or publishing.

For all these reasons, I think the action should be dismissed.

#### RECENT ENGLISH PRACTICE CASES.

##### DAVIS V. JAMES.

*Imp.* 1883, r. 200, 309—*Ont.* r. 128, 178.

*Pleading—Action on covenants in lease—Embarrassment.*

In an action on the covenants in a lease, the plaintiff alleged in his claim that he was entitled to the immediate reversion in the demised premises, and that he was entitled to enforce the covenants as against the defendant who was assignee of the term, and liable to perform the lessee's covenants.

*Held*, on motion to strike out as embarrassing, that such pleading was insufficient, and that the plaintiff ought also to have shown what the reversion was which the lessor had, and how the plaintiff derived his title to that particular reversion.

[L. R. 26 Ch. D. 778.]

KAY, J.,—In a case of this kind, in which the plaintiff can only sue as the assign of the reversion, by virtue of the statute of Henry VIII., and the other statutes which relate to the matter, the proper mode of pleading would be to state that A. B., being seized in fee, or having whatever estate he had, demised by a certain lease something less than his entire interest, and to state distinctly the mode in which the plaintiff had become entitled to that reversion, in such manner as to show that he had a right to sue upon the covenants. Take this case: a plaintiff alleges that he is entitled to the estate of some one who died, we will say, in 1792. He is out of occupation, but he says that that estate belongs to him. Is it enough for him to plead, "The estate is mine; it belongs to me; I am entitled to possession, and I therefore sue?" The question came before the Court of Appeal in *Philipps v. Philipps*, 4 Q. B. D. 127, and that was very much the case I have just referred to. It was



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liberty to shew by parol evidence the fact of such recommendations, though the written memorandum of sale and purchase made no reference thereto.

*Per* BURTON, J. A., and CAMERON, C. J.:—That defendant's language was mere commendation of the machines and did not amount to a warranty.

The jury at the trial rendered a verdict for \$200 more than the plaintiff claimed as damages which the Divisional Court refused to interfere with. On appeal to this Court, the ruling of the Court below was sustained.

*MacLennan*, Q.C., for the appellant.

*Lount*, Q.C., for the respondent.

#### CAMERON V. BICKFORD.

*Conflicting evidence—Reserving finding of judge.*

The learned judge who tried the case, in which the evidence was conflicting and irreconcilable, rested his conclusion in favour of the defendant on the documentary evidence and the probabilities arising in the case. This Court, while not differing from the judge as to the credibility of the parties or their witnesses, having come to a different conclusion on the whole evidence allowed the appeal and reversed the judgment of the Court below.

*McCarthy*, Q.C., and *Moss*, Q.C., for the appellant.

*S. H. Blake*, Q.C., and *MacLennan*, Q.C., for the respondent.

#### MIDLAND RAILWAY V. ONTARIO ROLLING MILLS.

Judgment of the Court below, 2. O. R. 1, was affirmed.

*J. K. Kerr*, Q.C., for the appellants.

*Osler*, Q.C., and *Laidlaw*, for respondents.

#### MALCOLMSON V. HAMILTON PROVIDENT AND LOAN SOCIETY.

*Verdict of jury.*

The father of the plaintiff applied to the defendant company for a loan of \$2,500 secured by land valued by the company's appraisers at \$3,500. In answer to certain printed questions put to the applicant, he

stated himself to be the owner of certain horses, cows, sheep and other stock, the plaintiff being present with his father at the time of making the application, although he swore in his evidence that he was not aware of the answers given by his father as to his personal assets, stock, etc. The defendants subsequently sued and obtained execution against the father, under which they seized certain live stock in the possession of the son, who had been residing apart from his father, and from whom, at that time, he had purchased several of the cattle, etc., and had ever since continued to feed and care for the cattle, etc.

In an action brought by the son against the company, the jury found in favour of the claim of the plaintiff, which verdict the Judge of the County Court refused to set aside.

On appeal, this Court refused to disturb such ruling of the County Judge, although, had the verdict been in favour of the defendants, this Court would have been better satisfied; the question being one proper for the decision of the jury.

*Crerar*, for the appeal.

*Wm. Bell*, contra.

#### COOK V. PATTERSON.

*Purchase of hay—Shrinkage—Loss by hay spoiling—Decision on the merits—Reference as to damages.*

The plaintiff contracted with the defendants for the purchase of a quantity of hay amounting to about 2,270 tons which was to be delivered at certain points, from which the plaintiff was to ship it to the New York market, and which was to be subject to examination before shipping. The plaintiff, without examination of the hay, forwarded it to New York, whereupon the agents of the plaintiff offering the same for sale, it was found to be greatly damaged by having become musty, thereby materially reducing its market value; and the weight had shrunk to the extent of about 200 tons. In an action to recover for the shortage and defective quality, the plaintiff asked for a reference as to damages, but the judge who tried the case refused the reference and entered judgment for the defendants.

*Held*, that when the evidence is contradic-

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tory the Court would not interfere with the decision of the judge who tried the case:

*Held*, also that in an action of that nature the questions must be tried by the judge; and the plaintiff is not entitled to give *prima facie* evidence of the breach of contract and ask for a reference as to damages.

*Bethune*, Q.C., and *D. Smart*, for the appellant.

*Hector Cameron*, Q.C., and *H. J. Scott*, Q.C., for the respondents.

#### ALEXANDER V. WANELL.

##### *Trust deed—Fraudulent contrivance.*

*Held* (reversing the judgment of the County Court), that an insolvent debtor on executing an assignment of his effects, where done *bona fide*, may empower the assignee to sell the business as a going concern, or to carry on the same until the assignee shall deem it advisable to distribute the estate—and, in thus carrying on the business to expend moneys of the estate in purchasing new goods and employing assistants in carrying out the trusts of the deed.

HAGARTY, C.J.O., dissenting, who thought that the mere fact of such stipulations being inserted in the instrument, no matter with what *bona fides* the same may have been done, renders it liable to be impeached as a fraudulent contrivance to hinder and delay creditors.

*Osler*, Q.C., and *Tetzels*, for the appellant.

*W. F. Walker*, for the respondent.

#### BURNS V. YOUNG.

##### *Half-breed rights—Transfer of scrip.*

The plaintiff had agreed with the defendant to purchase the claim to land scrip, in Manitoba, of a half-breed, and defendant did assign to plaintiff the claim of one alleged to be a child of a half-breed. This turned out to be incorrect and the scrip which had been issued to him was worthless.

*Held* (reversing the judgment of the County Court), that the plaintiff was entitled to recover from the defendant the amount paid by the plaintiff on the assignment of the so-called right; the plaintiff to assign to the defendant, *quantum valeat*, the land scrip he had received.

*A. Hoskin*, Q.C., for appellant.

*J. Roaf*, for respondent.

#### PEART V. GRAND TRUNK RAILWAY.

##### *Liability of railways—Neglect to sound whistle or bell.*

A locomotive of the defendants ran over and killed one P. In an action brought against the company by his representatives, it was sworn by several witnesses, who were near by at the time of the accident, that no bell was rung or whistle sounded. The jury found in favour of the plaintiffs, notwithstanding that the driver and other officers on the train swore that the bell was rung and the whistle sounded on approaching the crossing, when P. was killed, which the Divisional Court refused to set aside. On appeal to this Court the judgment of the Divisional Court was affirmed; CAMERON, C.J., dissenting.

*Bethune*, Q.C., for the appellants.

*Van Norman*, Q.C., for the respondents.

[October 20.]

#### BELL V. RIDDELL.

##### *Promissory note—Illegal consideration—Compounding felony.*

The judgment reported 2 O. R. 25, affirmed by this Court.

*Osler*, Q.C., and *Plumb*, for appellant.

*Falconbridge*, for respondent.

#### GARRETT V. ROBERTS.

##### *Action by a common informer—Infant.*

An infant cannot maintain an action for a penalty as a common informer.

The defendant was one of the deputy returning officers in the Lennox election. And on an alleged voter requesting a ballot claiming a right to vote as a tenant, it was alleged the voter had removed from the division where he claimed to vote. The returning officer insisted that the voter should take the oath stating that he was still resident within such division, the fact being that the voter had property there though resident outside which oath the voter refused to take; and the plaintiff, an infant under twenty-one years, instituted proceedings for the penalty of \$200, for which he recovered judgment in the County Court.

*Held*, on appeal to this Court, reversing the County Court, that the Statute 18 Eliz. ch., was in force in this Province and being so the

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plaintiff was incapable of maintaining the action by his next friend.

*Hector Cameron, Q.C., for appeal.*

*Riddell (Cobourg), contra.*

### CHANCERY DIVISION.

Wilson, C. J.]

[September 21.]

#### WEST V. PARKDALE.

*Municipality—Ultra vires—Performing work outside limits—Trespass.*

By 46 Vict. cap. 45 (O) it was provided that the City of Toronto and the Village of Parkdale might agree to construct a subway beneath the several railways which intersect Queen Street at and about the limits between Toronto and Parkdale, with power to expropriate and compensate property owners, etc. By an order of the Governor-General-in-Council passed in pursuance of 46 Vict. cap. 24 the Railway Companies whose railways crossed Queen Street were authorized to construct the subway; and the order recited a previous agreement by the Village of Parkdale to undertake the work. It was agreed between the Village and the Railway Companies that the Village should construct the subway and that the expenses should be shared equally. The village in performing the work destroyed the frontage of the plaintiff's land which was in the City of Toronto.

*Held*, that the Village of Parkdale were not acting under the Ontario Statute but under the Order in Council, that they could not exceed their power as a municipality and were therefore wrong doers with respect to the work done to the plaintiff's property.

*S. H. Blake, Q.C., Lash, Q.C., and Snelling for plaintiffs.*

*C. Robinson, Q.C., Foster and Proctor for the City of Toronto.*

*Osler, Q.C. and J. H. Macdonald for the Village of Parkdale.*

Proudfoot, J.]

[September 30.]

#### BEATTY V. HALDAN.

*Appeal from Master—Ascertaining amount due by administrator pendente lite to an estate—Moderation of his solicitor's costs.*

On an appeal from a certificate of the Master in which he held, that under an order

which directed him "to ascertain and state what amount (if any) is properly chargeable by J. H. against the estate of T. W., deceased, in respect of legal proceedings taken by the said J. H. as administrator *pendente lite* of the said estate in the Courts or otherwise," the bills of costs of the solicitor of the administrator should be taxed in order to ascertain the amount due. It was,

*Held*, that the Master was wrong. That the bills should if necessary be subjected to moderation and not taxation. That moderation is a well understood term, and is a more liberal proceeding than taxation, even as between solicitor and client.

*Hoyles, for the appeal.*

*O'Donohoe, Q.C., contra.*

Proudfoot, J.]

[October 2.]

#### RE MORTON.

*Vendor and Purchasers' Act, R. S. O. c. 109—Tax title—Necessary proof—Treasurer's books and returns—Treasurer's certificate.*

On an application under the Vendors and Purchasers' Act, R. S. O. cap. 109, to compel a purchaser to carry out a purchase it was shown that the vendor claimed through a tax sale and declined to produce any further evidence of the validity of the tax sale than was shown by Treasurer's deed and what might be obtained from the Treasurer's books, returns and warrants, to which he referred the purchaser.

*Held*, that the Treasurer's lists of lands in arrear for taxes furnished to the warden would be as valid evidence of the non-payment as the Treasurer's warrant to the sheriff under 16 Vict. c. 182, s. 55, was made by the judgment in *Clarke v. Buchanan*, 25 Gr. 559, and that coupled with the warrant from the warden, there would be no doubt about it and would afford evidence of non-payment up to the time of the sale.

*Held*, also, that the certificate of the Treasurer that the land was not redeemed is sufficient, and that an affidavit cannot be required from a public officer as to the proper discharge of his duty.

More evidence may be required as between a vendor and purchaser than in a suit where

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the owner or those claiming under him are parties.

*E. D. Armour*, for vendor.

*F. E. Hodgins*, for purchaser.

Proudfoot, J.]

[October 9.]

## LAIRD V. PATON.

*Reference as to title—When good title first shown—Registration of deed to vendor—When interest begins to run—Costs.*

On a reference as to title under a judgment which contained this clause, "And in case a good title can be made, an enquiry when it was first shown that such good title could be made." It was

*Held*, that these words meant when was a good title first shown upon the abstract.

*Held*, also, that a vendor does not complete his title until his deed is registered; *i.e.*, that registration is essential to the title.

A purchaser becomes liable to pay interest, when no time is fixed by the contract, from the time when he could prudently take possession and in the case of the purchase of several properties under an indivisible contract he cannot prudently take possession until the title to the whole is made.

The ordinary rule in a vendor's suit is that the costs are given against him up to the time when he has first shown a good title, but where the question as to title is not the chief matter in dispute, the costs will follow the result.

Where purchaser's objections to the title have caused the litigation and have been overruled he will be liable for cost notwithstanding any decision in his favor in particular points in dispute.

*J. R. Roaf*, for the vendor.

*Allan McNabb*, for the purchaser.

Boyd, C.]

[October 29.]

## COLE V. CANADA FIRE AND MARINE INSURANCE COMPANY.

## CLOSE'S CASE.

*Company—Winding up—Contributory—Laches—Delay in consummating transfer on books of company—45 Vic. c. 23 D.*

Appeal from the judgment of the Master at Hamilton placing the appellant on the list of

contributories of the above company which was being wound up under 45 Vic. c. 23 D., in respect of thirty shares.

The shares in question were purchased by C. in 1878; but the papers required to make a formal transfer to C. in the books of the company, were not furnished to the company till December 20th, 1881. On February 11th, 1882, C's name was entered on the list of shareholders, but there was no formal approval of the transfer by the Board of Directors until May 10th, 1883. But before this, on November 15th, 1882, C. was notified of a call on the shares and requested to pay the same. This was the first intimation C. received that the papers furnished by him had been acted upon, but he appeared to have made no further enquiry from the company after December 20th, 1881. The company ceased to do business on May 13th, 1883, and the winding up order was made on October 9th, 1883. It did not appear that C. had taken any steps to repudiate his position as a shareholder before these winding up proceedings; nor did he show any prejudice resulting to him from the failure of the company to notify him that the transfer to his name had been actually consummated on the books of the company.

*Held*, that under the above circumstances C. was rightly placed on the list of contributories, for having regard to the leisurely way of dealing between the parties, there did not seem to have been unreasonable delay in putting C's name on the lists of shareholders.

*Shepley*, for appellant.

*Laidlaw*, contra.

Boyd, C.]

[Nov. 1.]

## TRINITY COLLEGE V. HILL ET AL.

*Opening foreclosure—New account—Interest on principal—Interest and costs as found due by original decree—Special order as to costs by Court of Appeal—Execution—R. 351.*

Appeal from the Master's report.

This was a suit for foreclosure of a mortgage in which a decree was made on November 14th, 1877, and a final order of foreclosure obtained June 14th, 1878. In October, 1882, a petition was brought before Boyd, C., by the defendants to open the foreclosure, which indulgence was refused by him: 2 O.R. 348.

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The defendants thereupon appealed to the Court of Appeal who reversed this decision, and granted the indulgence prayed for, making an order to open the foreclosure on the usual terms of paying principal, interest and costs of the plaintiffs (including the plaintiffs' taxed costs of opposing the petition before Boyd, C.), and of the purchaser, Grattan (not including any costs of the appeal), together with any costs incurred by the purchaser in connection with his purchase of the property: 20 C.L.J. 262.

In taking the accounts the Master allowed to the plaintiffs interest on the whole amount of principal, interest and costs as found by the original decree of November 14th, 1877 (*supra* p. 359).

*Held*, that the Master was right in so doing.

The Master also allowed to the plaintiffs interest on the taxed costs of opposing the petition to open the foreclosure before Boyd, C.

*Held*, as to this, the Master was wrong. The costs payable under the order of Boyd, C., on that petition were not recoverable by force of that order, which was reversed, otherwise interest might properly have been recovered under Rule 351; but they were payable simply owing to the direction given by the Court of Appeal, that the plaintiffs' taxed costs of opposing that petition were to be paid by the defendants as a term of getting the indulgence craved by them.

The Master also allowed to the plaintiffs the costs of a writ of execution issued by them upon the order of Boyd, C., to recover their costs taxed thereunder.

*Held*, that the Master was wrong. The vacating of that order had the effect also of leveling the writ of execution, and there was no provision for the payment of the costs of that writ in the direction for payment of costs given by the Court of Appeal, for such costs are not part of the taxed costs of the petition, but incurred subsequently.

*Bain, Q.C.*, for the appeal.

*S. Vankoughnet, Q.C.*, contra.

*O'Brien*, for the purchaser.

Boyd, C.]

[November 5.]

## KAISER V. HAIGHT.

*Legacy—Receipt—Legatee not bound to execute release—Costs.*

J. B., being the owner of certain lands, by his will gave his son M. B. a legacy of \$150, and charged it on the land which he devised to his son W. B., an infant, with a provision that his son J. B. should occupy it during the minority of W. B., and pay the legacy. The land was so occupied and the legacy paid, and a receipt for its payment taken. W. B. subsequently sold the land to T. B., and T. B. sold it to J. C., who retained \$150 of the purchase money because the legacy was not released, but by an agreement agreed to pay T. B. the \$150 as soon as he should furnish release, duly executed by M. B. The right to receive the \$150 under this agreement, and any right that he had to get this release was assigned by T. B. to M. B., M. B. then tendered a release for execution to T. B., who declined to execute it, and upon a suit being brought to compel him so to do, it was

*Held*, that although the plaintiff was entitled to a judgment declaring that the legacy was paid, which might be registered; still, as the defendant had done no wrong, and had given a receipt for the legacy when it was paid, he was not compelled to sign anything else, and should not be punished by being ordered to pay the costs for not doing that which he was not bound in law to do.

The purchaser should not have objected to the title on account of the legacy, if there was proof of its being paid.

*T. H. Bull*, for the plaintiff.

No one appeared for the defendant.

Proudfoot, J.]

[Nov. 8.]

## CORE V. THE ONTARIO LOAN AND DEBENTURE CO.

*Mortgage—Marshalling securities—Registry Act—Prior equity.*

W. W., sen., owned north half Lot 14. and two lots in Village of Blyth, and applied for a loan to the above Loan Company, who required additional security. Accordingly, by mortgage of August 16th, 1880, W. W., sen., and W. W., jun., joined in a mortgage to the company, the

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[Prac.]

former mortgaging the above lands, and the latter the south half of Lot 16, Con. 8, and it was agreed in the mortgage that the mortgagors should have the right to have the south half of Lot 16 released when \$500 were paid, the village lots when \$600 were paid, or both the said properties when \$1,100 were paid. The mortgage was to secure \$4,000, and the evidence showed, though not so expressed in the mortgage, that W. W., jun., was only surety for his father, and received no part of the mortgage money. By deed of June 13th, 1882, W. W., jun., in consideration of \$500, sold the south half of Lot 16 to J. W., subject to \$500 to the Loan Company. By deed of February 14th, 1883, W. W., sen., having borrowed from him \$1,000 upon the security of the north half of Lot 14, granted the same to the plaintiff in fee, "Subject, however, to a mortgage of \$4,000 to the Loan Company, to be divided between the following lands, as follows: \$2,900 on the north half of Lot 14, \$500 on the south half of lot 16, and \$600 on the two village lots." This deed was registered before the deed to J. W., of which the plaintiff had no notice. Default being made under the mortgage of August 16th, 1880, the company, on April 4th, 1881, sold the lands, when the village lots fetched \$300, and the north half of Lot 14 \$4,450, which was more than enough to pay the company, but the surplus was not enough to pay the plaintiff.

The plaintiff now brought this action, claiming a lien on the south half of Lot 16 to the amount of \$500 at least, and a proportionate part of the arrears of interest due to the company on their mortgage towards satisfaction of the balance due to him after the application of the surplus proceeds of the sales already paid, and, if necessary, to stand in the place of the Loan Company, with all their rights and powers under their mortgage to the extent of \$500 and interest, maintaining that the company, having had security on several parcels of land, should not be allowed to realize their debt out of the one parcel on which he had alone security, and that the equitable right or interest of J. W., being unregistered, could not prevail against his subsequent registered equity without notice.

*Held*, that the plaintiff was not entitled to the lien claimed. If the Registry Act could in any case apply with regard to the equities now in

question it certainly could not apply here, for the plaintiff was not a grantee of the south half of lot 16 at all, and J. W.'s equity was to have that land relieved from the mortgage, the debt having been paid by the sale of the land of the principal debtor. It is essential to the doctrine of marshalling, not only that there should be two creditors of the same person, but that one of them should have two funds belonging to the same person to which he can resort; and marshalling is not enforced to the prejudice of third parties. The case shortly resolved itself into the case of two equities of which the plaintiff's was the later. He was entitled to the surplus in the hands of the Loan Company, and J. W. was entitled to have the mortgage to the company released as to the south half of Lot 16.

The American cases are equally clear that a court of equity will not compel a creditor to proceed against the estate of a surety, in order to leave the principal's estate free for the discharge of his debt.

*Quaig v. Sculthorpe*, 16 Gr. 449, cited as decisive of the present case.

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### PRACTICE.

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Ferguson, J.]

[June 16.]

#### McMILLAN v. WAUSBURGH.

*Examination of witnesses pending motion—Chy. G. O. 266.*

On an appeal from a taxing officer.

*Held*, overruling *Monaghan v. Dobbin*, 18 C. L. J. 180 that Chy. G. O. 266 has not been superseded by rule 285, O. J. A., and is still in force.

*Masten*, for the appeal.

*Hoyles*, contra.

Mr. Dalton, Q.C.]  
Osler, J. A.]

[September 13, 19.]

#### CLARK v. RAMA TIMBER TRANSPORT CO.

*Security for costs—Class suit.*

An application by the defendants for security for costs from the plaintiff on the ground that the latter was without means and merely a nominal plaintiff suing for the benefit of others.

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[Prac.]

It appeared that the plaintiff asserted a cause of action in which no one but himself was interested, viz.: a claim for damages for the flooding of the land leased by him but that there were several other persons interested in establishing the liability of the defendants for flooding their lands by the same overflow of which the plaintiff complained and that these persons had agreed to contribute to the plaintiff's costs of this suit. It was alleged by the defendants, but denied by the plaintiff, that he had not means sufficient to pay the costs of the action if it was decided against him.

*Held*, that the defendants were not entitled to security for costs..

*Clark v. St. Catharines*, 10 P. R. 205, distinguished.

*Arnoldi*, for motion.

*Holman*, contra.

[October 20.]

KEEFER v. MCKAY.

*Registry Act—Subsequent deed registered first—Clouds on title.*

The policy of the Registry Act is to make the Registry Office the place where the records of title to every man's property must be registered and to make the registration of instruments notice. To enforce that policy it provides that a subsequent deed from the same grantor shall, on registration, divest a grantee of an estate conveyed by a prior but unregistered deed, and vest such estate in the subsequent grantee.

The registration of any instrument which casts doubt or suspicion on a title, or which embarrasses the owner in maintaining his estate, or in disposing of his property, is a cloud upon the title against which the courts will relieve. And in such case it is sufficient if there be a registered instrument apparently valid on its face accompanied by a claim of title, although an intruder on the claim of title, which is likely to work mischief to the real owner.

It is a principle of Courts of Equity that they will not sell or enforce a sale of lands with a cloud on the title or where the title is too doubtful to be settled without litigation, or where the purchase would expose the purchaser to the danger of litigation.

A purchaser at a sale of lands, held under

an order of court, objected to the title on the ground that four deeds had been registered against half of the lot by parties who apparently intruded the deeds on the registered title, one of which parties notified the purchaser that he claimed some interest in the lands:

*Held*, that such registered deeds were clouds upon the title and that the purchaser could not be compelled to take such title.

Osler, J. A.]

[October 29]

THE QUEEN v. BASSETT.

*Conviction under the Vagrant Act.*

A motion for the discharge of the prisoner who was convicted by the Toronto Police Magistrate and sentenced to five months imprisonment under the Vagrant Act.

*Held*, that the Vagrant Act does not warrant an arrest much less a conviction on mere suspicion of dishonest intentions or suspicion of vagrancy. Before a person can be convicted of being a vagrant of the first class named in the Act ("all idle persons who not having visible means of maintaining themselves live without employment") he must have acquired in some degree a character which brings him within it, as an idle person who having no visible means of maintaining himself, i.e., not "paying his way" or being apparently able to do so yet lives without employment.

The prisoner was arrested at the Union Station, Toronto, having been pointed out to the police by some railway officials as a suspicious character, and had upon his person when arrested two cheques, one for \$1,700, the other for \$900, which were sworn to be such as are used by "confidence men," a mileage ticket (nearly used up) in favour of another person, and \$8 in cash. He vouchsafed no explanation of the cheques or the ticket and gave no information about himself. Under these circumstances an order was made for the prisoner's discharge.

*Morison*, for the prisoner.

*J. R. Cartwright*, for the Attorney-General.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Mr. Hodgins, Q.C.] [ December 14, 1883.  
October 30, 1884.

**CLARK V. UNION FIRE INSURANCE CO.**

*Solicitor and client—Taxation—Practice—Retainer—Jurisdiction of Master—Shareholder.*

In proceeding on a judgment for winding up a company, the former solicitor brought in a claim for bills of costs alleged to be due him which the Master referred to one of the taxing officers to tax.

*Held*, that the Master had authority to direct such reference.

The taxing officer has a discretion as to allowing the attendance of parties claiming a right to attend on such taxation and such discretion will not be lightly interfered with.

On such a reference the taxing officer gives his opinion as to whether the fees and charges claimed should be allowed or disallowed and on that opinion the Master makes his adjudication.

The taxing officer's allocatur is sufficient proof that the business charged for was done by the solicitor. The rule requiring special circumstances to warrant the re-opening or taxation of a bill of costs does not apply where the bill has been delivered after a company has been ordered to be wound up.

The general manager of a company had authority to do acts which occasionally required legal advice :

*Held*, that he had implied authority to retain a solicitor whenever in his judgment it was prudent to do so, but that such authority ceased on the suspension of the company's license.

Where the directors of a company have power to appoint officers and agents and dismiss them at pleasure.

*Held*, that their appointment of a solicitor need not be under the corporate seal. Where a solicitor had instructions to defend a suit which was discontinued and a new one for the same cause of action was commenced :

*Held*, that the original retainer to defend continued in the new suit.

A solicitor for a company is entitled to charge such company for special work and journeys undertaken at the request of individual directors and general managers.

In proceeding under a judgment for the winding up of a company the Master has the same

jurisdiction to try claims for unliquidated damages arising out of breach of contract as he would have in an administration proceeding.

Where a conditional agreement to take shares in a company is broken the shareholder is freed from liability on such shares. But where a collateral agreement to take such shares is broken by the company the shareholder is liable on such shares but has a right of action for indemnity or damages against such company.

Boyd, C.]

[Nov. 3.]

IN RE WALKER, A SOLICITOR.

WALKER V. ROCHESTER.

*Taxing solicitors' bill—Effect of payment—Special circumstances.*

Upon an appeal from the order of the Master in Chambers directing the taxation of the bills of costs which were sued on in the action *Walker v. Rochester*.

*Held*, that after payment the Court will not disturb the bill on the ground of overcharge unless it appears to be a case of gross and exorbitant claim amounting to fraud. But before payment it is enough if the items are unusual or more than ordinarily large so as to require justification and if no such explanation is furnished then a reference will be ordered.

The following circumstances were held not to be special circumstances which would entitle the client to tax the solicitor's bills after a year from the delivery because these circumstances could be as well considered at the trial of the action as on a reference to a taxing officer. (1) That the bills sued on contained certain items included in the other bills paid by the client. (2) That some work was charged for which never was done. (3) That a payment of \$200 on account by the client was disputed.

*Held*, however, that the conjunction of the following circumstances, viz.; that the relationship of solicitor and client was continued after delivery of the bills; that there was an offer by the solicitor to make a substantial deduction from the bills sued on, and, that there were items of apparent overcharge as to which no explanation was offered by the solicitor, supported the order for taxation.

*Holman*, for the appeal.

*Clement*, contra.

Prac.]

NOTES OF CANADIAN CASES—FLOTSAM AND JETSAM.

Mr. Dalton, Q.C.]

[Nov. 5.]

BROWN V. NELSON.

*Interpleader—Fi. fa. goods—Shares.*

A sheriff having seized certain shares of the capital stock of a public company under a writ of *fi. fa. goods* and having received notice of a claim to the shares made by an assignee of the judgment debtor applied for the usual interpleader order.

*Held*, that goods and chattels include "stock" for all the purposes of the Execution Act, and of the clauses for relief to the sheriff by interpleader.

Interpleader order made.

*Aylesworth*, for the sheriff.

*C. R. W. Biggar*, for the execution creditor.

*Wallace Nesbitt*, for the claimant.

Mr. Dalton, Q.C.]

[Nov. 8.]

BROWN V. NELSON.

*Set-off—Costs—Solicitor's lien.*

A motion by the defendant to set-off so much of the money recovered by the defendant against the plaintiff on defendant's counter-claim as will cover the costs adjudged to the plaintiff on his recovery against the defendant on his statement of claim.

The plaintiff's solicitors asserted a lien for costs which they contended should operate to prevent the set-off.

*Held*, under the circumstances that the plaintiff's solicitors had no right to interpose his interests to prevent equity being done between the principal parties.

Set-off ordered.

*C. R. W. Biggar*, for the motion.

*Wallace Nesbitt*, contra.

Master's Office.]

MERCHANTS' BANK V. MONTEITH.

*Imp. Act 38 Geo. 3 c. 87—R. S. O. c. 40, sec. 34 and 35, c. 46, sec. 32—Infant—Administration—Nullity—Suits by an infant—Liability for costs.*

The 6th sec. of 38 Geo. 3. c. 87 (*Imp.*) prohibiting the grant of probate to infants under the age of twenty-one is in force in Ontario, either as a rule of decision in matters relating to executors and administrators (*R. S. O. c. 40, sec. 34 and 35*) or as a rule of practice in the

Probate Court in England (*R. S. O. c. 46, sec. 32*).

An infant cannot lawfully be appointed administrator of an estate; and therefore a grant of probate or of letters of administration to an infant is void and confers no office and vests no estate in such infant. An infant had been appointed administrator of an estate and various suits had been brought in his name on behalf of such estate.

*Held*, that being an infant he was incapable of bringing suits in his own name or of making himself or the estate he assumed to represent liable for the costs of such suits.

Sections 57 and 58 of the Surrogate Act (*R. S. O. c. 46*) protect parties *bona fide* making payments to an executor or administrator notwithstanding any invalidity in the probate or letters of administration, but they do not protect payments made to third parties by an infant assuming to act as administrator of the estate. See *ante* p. 377.

## FLOTSAM AND JETSAM.

ORIGIN OF TRIAL BY JURY.—I. Phillips and Probst maintain that it originated among the Welsh, from whom it was borrowed by the Anglo-Saxons.

2. Coke, Von Maurer, Phillips, Selden, Spelman and Turner, regard it as having been original with the Anglo-Saxons.

3. Bacon, Blackstone, Montesquieu, Nicholson and Savigny hold that it was imported from *primitive* Germany.

4. Konrad Maurer thinks it is of *North* German origin.

5. Warmius and Warsaee agree that it was derived from the Norsemen through the Danes.

6. Hicks and Rees thinks it came from the Norsemen, through the Norman conquest.

7. Daniels says the Normans found it existing in France and adopted it.

8. Mohl thinks it derived from the usages of the Canon law.

9. Meyer thinks it came from Asia by way of the Crusades.

10. Maciejowski says it was derived from the Slavonic neighbours of the Angles and Saxons.

11. Brunner, Palgrave and Stubbs derive it from the Theodasian Code through the Frank Capitularies.

12. Hume says that it is derived from the decenary judiciary, and is "an institution admirable in itself, and the best calculated for the preservation of liberty and the administration of justice that was ever devised by the wit of man."

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

## TRINITY TERM, 1884.

During this term the following gentlemen were called to the Bar:—Samuel Clement Smoke, William Durie Gwynne, Stephen Frederick Washington, Thomas Thomson Porteous, Alexander Duntroun McIntyre, Matthew Munsell Brown, William Grant Thurston, Thomas Edward Williams, John Stewart, Napoleon Antoine Belcourt, George Washington Field, Francis Henry Keefer, Douglas Armour, Flavius Lionel Brooke, Alexander Carpenter Beasley. The names are arranged in the order in which the candidates were called.

The following gentlemen were admitted as students-at-law:—Graduates, James Morris Balderston, Alexander Robert Bartlett, Joseph Hetherington Bowes, Samuel William Broad, George Filmore Cane, John Coutts, George Henry Cowan, Robert James Leslie, Archibald Foster May, John Mercer McWhinney, James Albert Page, Horatio Osmond Ernest Pratt, Thomas Cowper Robinette, Robert Karl Sproule, Ernest Solomon Wigle, James McGregor Young, Roderick James MacLennan, George Frederick Henderson, Samuel Walter Perry, Richard S. Box, William Wallace Jones, William Louis Scott, Edmund Kershaw. Matriculants: Henry Herbert Johnston, Albert E. Baker, Herbert Holman, Charles D. Macaulay, George Albert Thrasher, John Williams, Seymour Corley. Junior Class: Henry Elwood McKee, Edward Lindsey Elwood, Walter Scott MacBrayne, Edwin Owen Swartz, Joseph Frederick Woodworth, Owen Richards, William Allan Skeans, Richard Lawrence Gosnell, Frederick Ernest Chapman, Nathaniel Mills, James McCullough, jun'r., John McKean.

The following gentlemen passed the examination of Articled Clerks:—John Alfred Webster, Alexander William McDougald.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

## Articled Clerks.

- Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

## Students-at-Law.

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.  
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar.

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## OR NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

## First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

**F E E S .**

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above .....	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

*Copies of Rules can be obtained from Messrs. Rowsell & Hutchason.*

# Canada Law Journal.

VOL. XX.

DECEMBER 1, 1884.

No. 21.

## DIARY FOR DECEMBER.

2. Tues.....County Court sittings, York, begin.
4. Thur.....Divisional Court sittings, Chancery Div. H. C. J., begin.
6. Sat.....Michaelmas sittings, Com. Law Div. H. C. J., end. Armour, J., sworn in Q.B., 1877.
7. Sun.....2nd Sunday in Advent.
9. Tues.....Gen. Sess. and Co. Ct. (except York) begin.
11. Thur.....Blake, V.-C., sworn in, 1872.
14. Sun.....3rd Sunday in Advent.
15. Mon.....Christmas vacation in Supreme Ct. and Exchequer Ct. begin. Morrison, J., sworn in Ct. of Appeal, 1877.

TORONTO, DECEMBER 1, 1884.

OUR English correspondent in his letter published in this issue, alludes, in passing, to the question of precedence of Colonial Queen's Counsel in England, which was recently authoritatively decided, through the very proper stand taken by Mr. Attorney-General Mowat in connection with the argument of the Boundary Case. Those who desire fuller information on the subject may be referred to our article of September 16th : (*supra* p. 299.)

THE decision of Vice-Chancellor Bacon, in England, at the suit of the present Lord Lytton, enjoining Miss Devey, executrix of the late Lady Lytton, from publishing letters written by the late Lord Lytton to his wife, on the ground that though the property in the letters, as pieces of paper, may be in Miss Devey (a point, however, as to which another suit is pending) yet, even so, that does not give her the right to publish them—has called forth a leading article from the *Times*, and is indeed of much interest not only to lawyers, but to all interested in the preservation of *bonos mores*.

LORD BRAMWELL's bill on the law of evidence proposes to enable any one who is charged with an offence to be a "competent witness" on the hearing at every stage. The wife or husband of the accused is in like manner to be a competent witness. And these provisions are to apply whether the accused is charged solely or jointly with others. But the accused is not to be compellable to be a witness, nor is the wife or husband to be admissible as a witness without the consent of the accused, "unless so compellable heretofore." When an accused person is a witness, he is not to have the right to refuse to answer a question on the ground that it would tend to criminate him as to the offence charged, unless the Court thinks fit to allow it.

IN an article published in this Journal, in the month of May last, we drew attention to the doubt which existed as to whether the Master in Chambers has jurisdiction to grant final judgment under Rule 80 (p. 159). There is an old story of a man who, being cast into gaol, sent for his lawyer, who after hearing the facts of the case, and what the man had done, exclaimed: "But they can't put you into prison for that! They can't put you into prison for that!" "But, by heaven, they have," replied the hapless client. In somewhat the same way the Master has again and again met objections to his jurisdiction to order final judgment under Rule 80, by ordering it. Now, however, we are glad to hear the question is likely to receive authoritative decision in a case of *Elliot v. Rogers*, recently argued before the Common Pleas Divisional Court and now standing for judgment.

## CHAMPERTOUS AGREEMENTS—SALE BY THE COURT—LEWIS' INDEX TO THE STATUTES OF ONTARIO.

THE *Central Law Journal* for November 21st, 1884, contains a long article on Champertous Agreements, a subject which has been much before the courts of late, in England in the case of *Bradlaugh v. Newdegate*, 11 Q. B. D. 1, and here in the matter of the motion to strike out *Langtry v. Dumoulin* from the cases standing for rehearing before the Divisional Court. The article illustrates, somewhat strikingly, the importance of a knowledge of the history of legal principles to their correct apprehension, by pointing out, as it does at the commencement, that the law of Champerty is a direct product of the feudal law, its *fons et origo* being the desire to prevent the rich and powerful barons from purchasing claims against those who were in debt, and overwhelming the debtor by a prosecution for payment at one time of all of his indebtedness, and also to prevent such magnates from buying up claims, and then, by means of their exalted and influential positions, overawing the courts, and thus securing unjust and unmerited judgments, and oppressing those against whom their anger was directed. For all of which Stubb's Constitutional History, vol. 3, p. 532-541; and Stephen's History of the Criminal Law of England, p. 236-238, are cited as authorities.

IN the case of *Boswell v. Cooks*, 51 L. T. 242, the Court laid down the following rules regulating the duty of purchasers of land sold under the authority of a Court of Justice: "A person desirous of buying property which is being sold under the direction of the Court must either abstain from laying any information before the Court in order to obtain its approval, or he must lay before it all the information he possesses, and which it is material the Court should have to enable it to form a judgment on the subject under its consideration. . . . If a party to an agreement obtain the sanction of the Court by with-

holding information which is material, and is known to him to be so, such withholding amounts to fraud, and the agreement ought not to stand. It is no answer to say that the information given to the Court was true, so far as it went, and that if the Court desired further information, it should have asked for it. The Court is neither buyer nor seller, and it is the duty of everyone laying materials before it for the purpose of obtaining its approval of any transaction, to take care that the materials furnished to guide the Court, shall not be incomplete or misleading. A purchase which has received the sanction of the Court will not be set aside upon slight grounds, but if the approval of the Court has been obtained by misrepresentation, or by the withholding of material information, through the absence of which the information furnished is misleading, the Court will treat such misrepresentation or withholding as fraud, and will act accordingly. The same rule applies to applications to the Master, or other officers of the Court to obtain their approval of sales or compromises, etc. *Brooke v. Mostyn*, 2 D. G. J. and S. 373."

SHORTLY before going to press, we have had placed in our hands an alphabetical Index of the Statutes of Ontario, down to and inclusive of the year 1884, including the Revised Statutes, by Edward Norman Lewis, Barrister-at-Law, published by Carswell & Co., Toronto. This has been a work much needed. The original index of the Revised Statutes was in the first instance anything but perfect, and since then there have been great numbers of supplementary statutes, and amending sections. We do not pay our legislators for nothing. They give us our money's worth in the way of legislation, and it is desirable that collections and indices should appear at short intervals. We, therefore, cordially welcome this and

## THE TRIENNIAL DIGEST—RESTRAINTS ON ALIENATION.

every attempt to supply the dearth of Canadian text-books, almost apart from questions of their individual merit. Of the merits of the present work only a prolonged user can really afford a test. It is an extensive work of four hundred and forty-seven pages, which must comprise many thousands of entries, and that of itself implies that the Statutes have been pretty thoroughly ransacked. One entry indeed we have been somewhat struck with. It occurs at page 361, and is as follows:—"Reside with respectable persons, children may be permitted to. See Industrial Schools, 1884." Indexing is tedious and monotonous work, and we take it Mr. Lewis is not without a sense of humour. Perhaps he had heard of the celebrated entry in an English Digest which consisted of, "Great mind: of Lord—," and which referred to a passage in the body of the work wherein it was stated that "Lord — stated he had a great mind" to do something or other.

WE also have before us the new triennial Digest by Mr. Christopher Robinson, Q.C., and Mr. F. J. Joseph, which we presume is by this time familiar to all practitioners. It appears to have been compiled with all the care of the former Digest by the same gentlemen. In one marked respect it is an advance upon that. We refer to the "Table of cases affirmed, reversed, or specially considered." The next triennial Digest will no doubt include in this table English cases commented on in our Courts, as well as Canadian. In another respect, on the other hand, this Digest seems to us to be a falling off from the former one, namely, in not comprising the numerous County Court decisions reported during the last three years, which have been published in these pages. Many of these decisions collate with much labour the cases on their respective subjects, and in the neces-

sary dearth of provincial text-books, to which we have already alluded, it seems a pity that they should be allowed to drop out of sight. The compilers of the Digest, or one of them at least, did we believe propose to include them, but the Law Society considered it better to confine the Digest to the regular reports. Possibly they thought that the profession perused this journal with so much care and were so familiar with its pages, that it was unnecessary to include the many valuable decisions which we are enabled to lay before our subscribers, and which do not find their way into any other reports.

## RESTRAINTS ON ALIENATION.

For some time past it has been assumed that a devise of land in fee subject to a partial restraint against alienation may be validly made. The restraint if limited in point of time, it was considered, must be reasonable and so as not to offend against the law against perpetuities. In our own Court of Appeal, this point, that a restraint of alienation for a limited time is good, was decided in *Earls v. McAlpine*, 6 A. R. 145. In that case a devise made subject to a proviso that the devisee should not sell or transfer the property without the consent of the testator's wife during her life, was held to be valid; and a mortgage made by the devisee, in violation of this restriction, was held to be invalid and to work a forfeiture of the estate, and the heirs-at-law of the testator were held entitled. In *re Winstanley*, 6 O. R. 315, the Divisional Court of the Chancery Division, have also held where a devise in fee was made subject to the restriction that the devisee should "not have power to dispose of it only by will and testament," the restriction against alienation was valid, and binding on the devisee. In the recent case *re Rosher*, *Rosher v. Rosher*, 26 Ch. D. 801 Pearson, J., however, seems to

## RESTRAINTS ON ALIENATION—OUR ENGLISH LETTER.

have let in new light on the subject, and going back to first principles he has come to the conclusion that a restraint on alienation limited to the life of another grafted on a devise in fee, is void for repugnancy. He considers the statement of the law which has got into the text-books and has even received the sanction of so learned a Judge as the late Sir Geo. Jessel, to the effect that a restraint on alienation is good if limited to a reasonable time, arises from a misconception of the effect of *Large's Case*, 3 Leon 182, which appears to have been first pointed out in the American case of *Mandlebaum v. McDonell*, 18 Am. Rep. 61, 80. The devise in *Large's Case* is stated as follows: "A. seized of lands in fee, devised the same to his wife till William, his younger son, should come to the age of twenty-two years, the remainder when the said William should come to such age, of his lands in D. to his two sons, Alexander and John, the remainder of his lands in C. to two other of his sons, upon condition, *quod si aliquis dictorum filiorum suorum circumibit vendere terram suam* before his said son William should attain his said age of twenty-two years, *in perpetuum perderet eam.*" From which it appears as pointed out by Mr. Justice Christiancy, in the American case, that there was no devise of the fee simple subject to a condition not to alien, but on the contrary only the limitation of a contingent remainder to the sons upon condition that if before they came in possession, (*i.e.*, on William coming to the age of twenty-two) either of them should attempt to sell his land he should lose it; one of the sons having sold before that time it was held he could not qualify himself to take the contingent remainder, and, therefore, that it failed altogether. The case of *re Rosher*, *Rosher v. Rosher*, is one in which the property at stake is of large value, and no doubt the opinion of a Court of Appeal will be asked upon the question and we

shall watch with interest the future stages of the case.

## OUR ENGLISH LETTER.

(From our own Correspondent.)

My silence has not been due to want of application, but to an unprecedented dearth of material. Legal gossip has for some months been an unknown quantity; the law reports in the *Times* have been detailed accounts of the commonest of bankruptcy cases; the judges have been keeping holiday. Never, perhaps, within the memory of the oldest inhabitant of the Temple or Lincoln's inn has vacation business been so weak and rare as in the summer of 1884. One or two leading juniors, men who, as John Bright would say, can almost hear the silk gown rustling upon their backs, tell me that if they had been content to stay up in town throughout August they would have had a good deal of work, but the briefless army are certainly little encouraged by business to face the heat and dust of the autumn. This was formerly their gleaning time, in which they gathered into their bosom the straws which the great men left behind them when they bound up their sheaves. Now great men leave nothing behind, and the highest among the stuff-gownsmen are quite ready to undertake the smallest business. These good gentlemen are passing through an anxious crisis at the present moment. It was, I think, in May or June last that a considerable number of them applied for silk. Very few of the applications, if any, were made by men who had not the best right possible to expect their wishes to be immediately fulfilled. But the Lord Chancellor, good man, has the most rooted objection to creating new silks and prefers to keep all these men in ruinous suspense. For such suspense is ruinous, seeing that solicitors are doubtful whether, when they

## OUR ENGLISH LETTER—RECENT ENGLISH DECISIONS.

give a man work, they are retaining him as a leader and a junior. I do not, however, imagine that a recent suggestion that men should not be compelled to request the honour, but that the Lord Chancellor, should, *sponte sua*, confer it upon them, is likely to be popular. If this rule were adopted several undesirable consequences would ensue, and the most 'undesirable of all would be that politics would influence the choice. Yet a man is neither a worse nor a better lawyer because he is the hottest of Tories or the fiercest of Radicals.

Among the men whose fate is hanging in the balance just now are Moulton, of scientific renown; Crump, of Bradlaugh fame, whose powers of close argument have recently been made known to the Privy Council in one or two Canadian cases, and Woolf, of the Bankruptcy Bar. There are others of equal celebrity, but these three are the most likely to make their mark. The first is a specialist, the second is an exceedingly subtle lawyer and master of considerable eloquence, and the third is versed in the intricacies of Bankruptcy. Now, in Bankruptcy, there is much need of leaders.

Amongst the few satisfactory topics of the day is the recent decision with regard to the status of colonial Queen's Counsel when circumstances bring them before the English Courts. Englishmen have long desired the settlement of this question. Only last term a young friend of your correspondent was engaged to appear before the Privy Council, together with an eminent member of the New Zealand Bar. It was the very first occasion in which he appeared in Court. No one was more anxious that the real leader should be to the fore. Yet the practice was so unsettled that up to the last moment neither leader nor junior knew what was to be done. This, of course, was an extreme case, but the final settlement of the question is grateful to all. A Canadian lawyer knows

at least as much, and probably a great deal more, of Canadian law than an English barrister of equal standing, and it is right and proper that they should rank simply by seniority, and that there should be no other distinction between them.

It is not too much to say that a deadlock in the Queen's Bench Division is inevitable. During the forthcoming assizes there will be only six common law judges left in town to do all the work in Court and Chambers. The Bar regards the prospect with despair, especially when it sees that the merchants of the city are sick and tired of delays and are showing an increasing desire to settle their difficulties by arbitration. A leading shipowner and Member of Parliament told me the other day that he would rather incur any loss or suffer any injustice than submit to the delays of the admiralty courts. But the admiralty courts are not a whit worse off than the Queen's Bench Division.

A recent book, David Dudley Field's *Miscellaneous Writings and Speeches* makes one's blood boil for Canada. If any one wants his old sores re-opened, he cannot do better, after looking at the map of North America, than read Mr. Field's review of the Oregon question. He will not adopt Mr. Field's conclusions, but will rise with a strong conviction that the apathy of the English Government and its proverbial indecision allowed the sacrifice of a piece of territory which would be of infinite value to us now.

## RECENT ENGLISH DECISIONS.

THE November numbers of the *Law Reports* consist of 9 App. Cas. p. 595 to 756; 13 Q.B.D. p. 649 to 696; 9 P.D. p. 181 to 217; 27 Ch. D. p. 1 to 361.

ARBITRATION CLAUSES—JURISDICTION OF ARBITRATOR WHEN LIABILITY UNDER THE ACT IS BONA FIDE DISPUTED.

The first case in the first of these, *Brierley Hill Local Board v. Pearsall*, p.

## RECENT ENGLISH DECISIONS.

595, requires some short notice, because, though the decision has immediate reference to a claim for compensation under the English Public Health Act, 1875, the rule it lays down might probably apply to applications for compensation under the arbitration clauses of many of our own acts. The decision lays down that where a claim for compensation is made against a local authority under the said Act for damage caused by them in the exercise of their powers, and the local authority *bona fide* disputes their liability to make compensation at all under the Act, the arbitrator, nevertheless, has jurisdiction to hold his arbitration and make his award as to the fact of damage and the amount of compensation, and the proper course of the local authority is to raise the question of liability in their defence to an action upon the award. Lord Fitzgerald says at p. 603: "In the execution of his duties it is difficult to see how the arbitrators can avoid inquiring whether the acts complained of were matters done in the exercise of the powers of the Act, and as to which the claimant was not himself in default, so as to limit the scope of his assessment of compensation; but his decision, if any, as to the liability of the defendants in point of law would not be binding and would be inoperative. If the damage complained of has been occasioned apparently by reason of the exercise of the powers of the Act, the arbitrator proceeds to assess the amount of compensation limited to such damages, and leaving it open to the defendants, if they think fit, to contest their liability to the amount awarded on any grounds that may be open to them."

CONTRACT BY CREDITOR TO TAKE LESS THAN SUM DUE—  
NUDUM FACTUM.

In the next case, *Foakes v. Beer*, p. 605, the House of Lords proceed upon a doctrine, which Lord Selborne states, at p. 610, "has been accepted as part of the law of

England for 280 years." "The doctrine," he goes on to say, "as stated in *Pinnel's* case, 5 Rep. 117, a. is 'that payment of a lesser sum on the day (it would of course be the same after the day), in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum.'" By the case before the House a judgment creditor entered into an agreement (in writing, but not under seal) with the judgment debtor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments, the creditor would not take any proceedings on the judgment. In accordance with the agreement the debtor paid the whole amount of the judgment, but the judgment creditor nevertheless took steps to enforce payment of interest upon the judgment, and the Lords held, affirming the decision of the Court of Appeal, that the agreement was *nudum pactum*, being without consideration, and the creditor was entitled to enforce payment of the interest. Lord Blackburn, in a lengthy judgment, points out that the doctrine in *Pinnel's* case is only a *dictum*, and though he admits it has been treated as good law by great judges, yet he says, p. 617: "Notwithstanding the very high authority of Lord Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges." At the end of his judgment he says: "What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand

## RECENT ENGLISH DECISIONS.

may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. . . . I had persuaded myself that there was no such long-continued action on this *dictum* as to render it improper in this House to reconsider the question. I had written my reasons for so thinking, but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them." Thus he appears to intimate that were it not for the opinion of the other Lords he would have over-ruled the *dictum* on which the doctrine in question originally rested. The opinion of the rest of the Lords seems expressed in a concluding sentence in Lord Fitzgerald's judgment, when he says: "We find the law to have been accepted, as stated, for a great length of time, and I apprehend it is not now within our province to overturn it."

## LIFE ASSURANCE—OF TEMPERATE HABITS.

The next case calling for special notice is *Thomson v. Weans*, p. 671, the judgments in which might be read with advantage, possibly, by some temperance lecturers, more remarkable for their zeal than for their breadth of view, as they comprise an endeavour to arrive at a more or less definite idea of what constitutes "temperance." An applicant for life insurance, in answer to the question, "Are you temperate in your habits?" replied, "Temperate;" and to the following question, "Have you always been strictly so?" replied, "Yes." Subjoined to the printed questions was a declaration which A. signed, to the effect that the foregoing statements were true, and that the assured agreed that this declaration should be the basis of the contract, and that if any untrue averment, etc., was made, the policy was to be absolutely void, and all moneys received as premiums forfeited. The policy recited

the above declaration as the basis of the contract. The House held, reversing the Court below, that the declaration of A., taken in connection with the policy, constituted an express warranty that the answers to the questions were true in fact; and as the evidence clearly proved A.'s averment as to his temperance untrue, the policy was absolutely null and void. Lord Watson's words, at p. 695, might be read out with advantage in other places than Courts of law: "I believe it to be useless to attempt a precise definition of what constitutes 'temperate habits,' or 'temperance,' in the sense in which these expressions are ordinarily employed. Men differ so much in their capacity for imbibing strong drinks that quantity affords no test; what one man might take without exceeding the bounds of moderation, another could not take without committing excess. In judging of a man's sobriety, his position in life, and the habits of the class to which he belongs must, in my opinion, always be taken into account; because it is the custom of men engaged in certain lines of business to take what is called refreshment, without any imputation of excess, at times when a similar indulgence on the part of men not so engaged would be, to say the least, suspicious. . . . In the present case the evidence clearly establishes that the assured was a most able and estimable man, but that circumstance is not of much weight, because able and estimable men are not necessarily exempt from social failings." The judgment of Lord Fitzgerald, which follows that of Lord Watson, is chiefly remarkable from the fact that it contains two poetical quotations in a single page.

A. H. F. L.

## BARON HUDDLESTON ON JUSTIFYING HOMICIDE.

## SELECTIONS.

## BARON HUDDLESTON ON JUSTIFYING HOMICIDE.

At the Exeter Assizes, on November 3, Baron Huddleston, in charging the grand jury, referred at length to the charge against Dudley and Stephens, captain and mate of the "Mignonette," of murdering the boy Parker when at sea in an open boat. After detailing the circumstances of the case, the learned judge said:—

It seems clear that the taking away of the boy's life was carefully considered, and amounted to a case of deliberate homicide. I must tell you what I consider to be the law as applicable to this case. It is a matter that has undergone considerable discussion, and it has been said that it comes within a class of cases where the killing of another is excusable on the ground of necessity. I can find no authority for that proposition in the recognised treatises on the criminal law, and I know of no such law as the law of England. Baron Puffendorf, in his "Law of Nature and Nations," mentions a case (Bk. II. ch. 6, p. 205, third edition, by Kennet, A.D. 1717) where seven Englishmen, tossed in the main ocean without meat or drink, killed one of their number on whom the lot fell, and who had, as he says, the courage not to be dissatisfied, assuaging in some measure with his body their intolerable and almost famished condition, whom, when they at last came to shore, the judges absolved of the crime of murder. Although he says the men were English sailors, he does not say where the case was tried, nor of what nation were the judges. Ziegler upon Grotius, giving this relation, is of opinion that "the men were all guilty of a great sin for conspiring against the life of one of the company, and (if it should happen) every one against his own." I can find no reliable report of this case, and for reasons which I shall refer to presently, I cannot consider it an authority binding on me. There is an American case, *The United States v. Holmes*, March, 1842, which is reported in 1 Wallace Jun. 1, in which sailors threw passengers overboard to lighten a boat, and it was held that the sailors ought to have been thrown over-

board first, unless they were required to work the boat, and that at all events the particular persons to be sacrificed ought to have been decided on by ballot, by which, I suppose, they meant by lot. I cannot subscribe to the authority of this case. Besides it would be inapplicable to the present, because here the notion of deciding by lot was rejected. The learned American judge, in giving his reasons, said: "That the selected should be by lot, as it would be an appeal to Providence to choose the victims." Such a reason would seem almost to verge upon the blasphemous. I cannot but consider that the taking of human life by appealing to the doctrine of chance would really seem to increase the deliberation with which the act had been committed. That American case, however, was a charge, not of murder, but of manslaughter on the ground of the failure, on the part of the prisoners, to discharge the statutory duty of preserving the life of a passenger. The question has been considered by the Criminal Code Bill Commissioners in their report, in which, discussing this doctrine, they say:—

"Casuists have for centuries amused themselves, and may amuse themselves for centuries to come, by speculation as to the moral duty of two persons in the water struggling for the possession of a plank capable of supporting only one. If ever a case should occur for decision in a Court of Justice, which is improbable, it may be found that the particular circumstances render it easy of solution. We are certainly not prepared to suggest that necessity should in every case be a justification; we are equally unprepared to suggest that necessity should in no case be a defence. We judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case."

And my brother Stephen, in his "History of the Criminal Law," observes that this doctrine is one of the curiosities of the law, and so far as he is aware is a subject on which the law of England is so vague that, if cases raising the question should ever occur, the judge would practically be able to lay down any rule which they considered expedient. I do not derive much assistance from either of the cases, or from the report of the Criminal Code

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Commissioners, and I am therefore obliged to tell you what, in my judgment, after careful consideration, I deem to be the law of England. Deliberate homicide can be justifiable or excusable only under certain well recognised heads—cases where men are put to death by order of a legally constituted tribunal in pursuance of a legal sentence; cases where the killing is in advancement of public justice, as, for instance, criminals escaping from justice, resisting their lawful apprehension, and other such cases enumerated by Blackstone, vol. iv. 48. So also where homicide is committed for the prevention of any forcible and atrocious crime; again where men in the discharge of their duty to their country and in the service of their queen kill any of the enemies of their queen and country; and, lastly, where an individual, acting in lawful defence of himself or his property, or in the reasonable apprehension of danger to his life, kills another. It is obvious that this case falls under none of these heads. The illustration found in the writers upon civil law, which is alluded to in "*Cicero de Officiis*," and mentioned by Lord Bacon in his "*Elements of the Law*," and which is quoted in some legal works as the ground of the doctrine of necessity, is placed by Blackstone under the latter head—of self-defence. He says: "Where two persons being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned, he who thus preserves his own life at the expense of another man's is excused from unavoidable necessity and the principle of self-defence, since their both remaining on the same weak plank is a mutual though innocent attempt upon and endangering of each other's life. But Sir William Blackstone, in another part of the same volume, points out that under no circumstance can an innocent man be slain for the purpose of saving the life of another who is not his assailant; and he says, therefore, though a man be violently assaulted, and hath no possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder, for he ought rather to die himself than escape by the murder of an innocent; but "in such a case he is permitted to kill the assailant, for there the law of nature and self-defence, its primary

canon, have made him his own protector." Bishop, in his "*Criminal Law*," a high American authority, supports this view, and it is the more important, as he refers to the American case to which I have before alluded. It is impossible to say that the act of Dudley and Stephens was an act of self-defence. Parker, at the bottom of the boat, was not endangering their lives by any act of his; the boat could hold them all, and the motive for killing him was not for the purpose of lightening the boat, but for the purpose of eating him, which they could do when dead, but not while living. What really imperilled their lives was not the presence of Parker, but the absence of food and drink. It could not be doubted for a moment that if Parker was possessed of a weapon of defence—say a revolver—he would have been perfectly justified in taking the life of the captain, who was on the point of killing him, which shows clearly that the act of the captain was unjustifiable. It may be said that the selection of the boy—as, indeed, Dudley seems to have said—was better, because his stake in society, having no children at all, was less than theirs; but if such reasoning is to be allowed for a moment, Cicero's test is that under such circumstances of emergency the man who is to be sacrificed is to be the man who will be the least likely to do benefit to the republic, in which case Parker, as a young man, might be likely to live longer and be of more service to the republic than the others. Such reasoning must be always more ingenious than true. Nor can it be urged for a moment, that the state of Parker's health, which is alleged to have been failing in consequence of his drinking the salt water, would justify it. No person is permitted, according to the law of this country, to accelerate the death of another. Besides if once this doctrine of necessity is to be admitted, why was Parker selected rather than any of the other three? One would have imagined that his state of health and the misery in which he was at the time would have obtained for him more consideration at their hands. However, it is idle to lose one's self in speculation of this description. I am bound to tell you that if you are satisfied that the boy's death was caused or accelerated by the act of Dudley, or Dudley and Stephens, this is a case of deliberate homicide,

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neither justifiable nor excusable, and the crime is murder, and you, therefore, ought to find a true bill for murder against one or both of the prisoners. You will perhaps be good enough to say whether, with reference to the mate Stephens, there is evidence which will satisfy you that he was abetting or aiding or sanctioning the conduct of Dudley. If so you will find a true bill against him. In his statutory examination on oath he says that the master (Dudley) selected Parker as being the weakest, that he agreed to this, and the master accordingly killed the lad. Unless you disbelieved him, therefore, you will find a true bill against him as well as Dudley. I may say that Captain Dudley seems to have made no secret of what has taken place, and to have voluntarily furnished all the evidence against himself, although it is quite true that the course taken by the magistrate, very properly, in making Brooks a witness supplies also evidence for the prosecution. The case having taken place on the high seas, and being a case of British subjects, is one which, by statute, is triable here. No person who has read the details of this painful case but must be filled with the deepest compassion for the unhappy men who were placed in this frightful position. I have only in this preliminary stage to tell you what the law is, but if you should feel yourselves bound to find the bill, I shall then take care that the matter shall be placed in a form for further consideration if it become necessary. I think I am bound to do this after the report of the cases I mentioned in Puffendorf and in the American reports, and the report of the Criminal Law Commissioners. The matter may then be carefully argued, and if there is any such doctrine as that suggested, the prisoners will have the benefit of it. If there is not, it will enable them, under the peculiar circumstances of this melancholy case, to appeal to the mercy of the Crown, in which, by the constitution of this country (as a great lawyer points out) is vested the power of pardoning particular objects of compassion and softening the law in cases of peculiar hardship.

The grand jury eventually returned a true bill for wilful murder against Dudley and Stephens.—*Law Journal*.

## CANADA REPORTS.

### ONTARIO.

#### COUNTY COURT OF THE COUNTY OF YORK.

##### CARLETON V. MILLER.

##### *Replevin—Gambling transaction—Imp. Stat. 9 Anne cap. 14.*

In an action of replevin to recover a watch worth \$100, staked upon a game of cards between plaintiff and defendant, the stakes having been taken by defendant before the alleged event of the game. *Held*, that Imp. Stat. 9 Anne cap. 14, is in force in this country, though repealed in England, but that the plaintiff could not rely on sec. 2 of that act "to recover back money or chattels exceeding £10 in value lost at cards," as his action was not founded upon the statute.

*Held*, further, that independently of the statute, that the illegal contract being executed, and the plaintiff *in pari delicto* with the defendant, he could not recover.

[Toronto, June 30.]

This was an action of replevin. It was alleged by the plaintiff that the defendant wrongfully took from him a gold watch and that he wrongfully, etc. detains the same, etc., and the plaintiff claimed \$150 damages for the alleged detention.

MACDOUGALL, J.J.—The case was tried before me with a jury at the last sittings of the County Court, and after hearing the evidence of the plaintiff and his principal witness, I refused to allow the case to proceed further, and dismissed the action with costs.

In term *J. K. Kerr*, Q.C., moved for a rule calling upon the defendant to show cause why a new trial should not be ordered upon the ground that the plaintiff had established his title to the watch in question, and that I should not have withdrawn the case from the jury. A notice of motion for a new trial upon the same grounds was also served upon the defendant's solicitors. I granted the rule and upon the return thereof

*James Till*, Q.C., showed cause.

The facts of the case so far as the evidence given establishes them, certainly reveal a most singular condition of morality in the community where the parties reside.

The plaintiff it appears having met the defendant engaged with him in what is known as a game of pool for money stakes. At the game which is one involving a certain amount of skill, the plaintiff was successful, and won from the defendant \$10. Later in the day or evening the defendant, anxious to retrieve his fallen fortunes, (the plaintiff being unwilling to give him his revenge at pool,)

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proposed a game of cards. This was ultimately agreed upon and the parties met with some friends at a room in a livery stable, where they played cards, the result of the gambling being that the plaintiff, apparently not too much encumbered with ready money, lost his watch, he having put it up as a stake against \$100 in money, put up by the defendant.

It will be somewhat the reverse of edifying to learn of some of the steps taken by the plaintiff and his friends to prepare for the game of cards. The plaintiff's own account of it is charming in its frankness. He says some one came to him and asked him to play cards, but that he objected, because as he puts it, "if he had any money those who were likely to play with him would put up a job on him and take his money." One Simpson it appears was the individual who endeavoured to persuade the plaintiff to play, and he (Simpson) seems to have been ready with a suggestion to meet the difficulty urged by the plaintiff, and said he would arrange it so that the plaintiff would not get the worst of it. These two worthies with the assistance of another man, named Lucas, who possessed apparently similar tastes and instincts retired to a room, and having procured a new pack of cards, sat down together and deliberately set to work and marked these cards, one by one, in such a manner that, if they were played with, the plaintiff would be able to know exactly what cards his opponents or opponent held. This arrangement being successfully completed and the marked cards carefully placed back in their original package, so that they might appear as a pack newly purchased, the plaintiff withdrew all his objections to playing, and equipped for a fresh encounter, he repaired with his two friends, Simpson and Lucas, to the livery stable, where he understood he would meet his former adversary, the defendant, and there and then afford him the revenge for which he (the defendant) was supposed to be thirsting.

The parties met, and it seems that some games were played at first in which other persons joined. It does not appear what was the result of this portion of the evening's entertainment, but the plaintiff having ordered in some liquors to soften the asperities of the game, after a round or two of drinks, speedily found himself face to face with his old antagonist, the defendant, engaged in a game of *enchre*. The game Simpson says was to consist of ten points, and the stakes were to be \$200, or \$100 each. The plaintiff not having that amount in ready money with him put his gold watch (with assent of the defendant) to represent his (the plaintiff's) \$100. The cards used in playing were the marked cards. Simpson says that it was a

rule of the game that whoever cheated lost the game.

The plaintiff and defendant played two games, neither of which decided the question as to who was winner. Simpson says the defendant accused the plaintiff of cheating but after disputing over the matter twice agreed to commence over again, and play a third or final game which it was mutually agreed should be *square*. The defendant—*Simpson and the plaintiff both state this*—was unaware that the cards were marked.

Before the third and final game was concluded the defendant again accused the plaintiff of cheating and gave up playing, claiming the stakes as forfeited to him—and gathering them up from the table—apparently without remonstrance at the time—went out. Both parties had been drinking, and the plaintiff declares, that he was unaware that he had lost his watch until the next day.

Upon these facts the plaintiff seeks to recover his watch or damages for its detention.

The action is not an action brought upon the Statute of 9 Anne, cap. 14. sec. 2, to recover back money or chattels exceeding £10, in value lost at cards. The plaintiff does not found his claim upon the statute at all. He simply claims for a wrongful taking of his goods, and for their wrongful detention. I do not think that he can claim the benefit of this statute (which appears to be in force in this Country though repealed in England by Imp. 8-9 Vict. cap. 109), except in an action founded upon the Statute: *Thistlewood v. Cra-croft*, 1 M. & S. 500.

The plaintiff and defendant played at an illegal game for money or goods. I think that the money or goods having changed hands upon the event of such illegal game, in which the plaintiff himself was admittedly taking a most atrociously unfair advantage of the defendant by playing with marked cards, he cannot ask a Court to assist him to recover back his money or goods. The illegal contract was executed and the plaintiff *in pari delicto* with the defendant. He cannot therefore recover: *Andree v. Fletcher*, 3 T. R. 266; *Taylor v. Chester*, L. R. 4 Q. B. 309.

From the plaintiff's own statement his cause of action appears to rise *ex turpi causa*, and he has no right to be assisted.

It is urged by Mr. Kerr that the game was not finished, and that the defendant therefore possessed himself of the watch improperly by taking it off the table; and that, though perhaps not guilty of stealing, the event never happened—illegal though it was—which gave the right to the defendant to take or claim the watch as his. The answer to this view, it appears to me is most conclusive. The

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plaintiff's witness, Simpson, says it was a rule of the game that any cheating lost the game to the party guilty of the cheating; that it was agreed between the defendant and the plaintiff that it should be a *square*—that is an honest—game. Yet notwithstanding this definite compact, the plaintiff was playing with a marked pack of cards—a pack on his own testimony prepared by himself to enable him to win in any event and under all circumstances.

It is to be hoped that Courts of Justice will be seldom occupied in trying cases of this description. The County Court of York shall not be much troubled with them while I am a judge of the Court, where it is within my power, to deal summarily with them.

This exposure of village immorality and corruptness is one of the most startling ever coming under my notice, and one hardly knows whether to be amazed most at the refreshing frankness with which the plaintiff unblushingly details his villainous preparations to defeat the defendant at cards, or at his temerity in bringing such an action in any Court of Justice in the land.

The rule will be discharged and the motion refused both with costs.

#### ASSESSMENT CASE.

#### IN RE CANADA LIFE ASSURANCE COMPANY AND THE CITY OF HAMILTON.

*Assessment—Taxation—Income—Insurance Company  
—Money payable to policy holders on the partici-  
pation scale.*

*Held*, that moneys in the hands of an insurance company for payment to the policy-holders, or to be added to their policies at the next distribution of profits, are not to be considered as part of the income of the company for purposes of assessment.

[Hamilton.]

This was an appeal to the County Judge by the Canada Life Assurance Company from the Court of Revision of the City of Hamilton, which held that the moneys in the hands of the Company for payment to policy-holders under the Act 42 Vict. ch. 71 (D.) were a part of the income of the Company for the purposes of assessment.

*A. Bruce*, for the appeal.

*F. MacKelcan*, Q.C., contra.

SINCLAIR, Co. J., (after referring at length to the Act of incorporation of the Company, 12 Vict. ch. 168, the objects of the Company and the scope of the amending Act of 42 Vict. ch. 71), continued:—  
“Since the passing of the Act of the Dominion Parliament, 42 Vict. ch. 71 (D.), no division of profits has been made, that being done according to the

by-laws of the Company only once in every five years (except that made in 1880). The profits have not been estimated since the year 1880, and the next estimation and division of profits will be next year (1885). It is admitted that the Company since the year 1880 has been earning large profits in proportion to the amount of their capital. The municipal authorities of Hamilton have made an assessment for the year 1884 of the income of this Company at \$40,000, which on appeal to the Court of Revision was confirmed. The Company now appeals against that decision, and I have now to determine upon what principle that income should properly be assessed.”

The learned judge then discussed the meaning of the word “income,” used in the Assessment Act and amending Acts, as applied to this case, and reviewed the evidence, from which it appears that the profits for the five years ending with 1880 averaged \$148,979.30 a year, and that the nearest estimate of the annual net profits of the Company over and above the amount payable to policy-holders is \$29,926.84, and says that the Company should have been assessed either for the sum of \$148,979.30 or the sum of \$29,926.84. He then continued:—“The question therefore remains: What is the income of this Company for the purposes of assessment, and are the moneys which, as the Company contends, remain in their hands for payment to the policy-holders, or to be added to their policies at the next distribution of profits, to be considered as part of their profits for the purposes of assessment? Mr. Bruce argued that these moneys were not those of the Company: that they held them for the policy-holders, to be paid out to them or their representatives on the happening of a certain event, and that the Company as such should not be taxed for them. Mr. MacKelcan would not argue that the policy-holders were not entitled to their share of the profits of the Company, but that such profits being found in the possession of this Company were taxable as income, and that it did not matter what they afterwards did with them or were by law compelled to do with them.”

The learned judge then discussed the legal obligation of the Company to pay a proportion of the profits to its policy-holders, citing the Act 42 Vict. ch. 71 (D.); Addison on Contracts, 7th Ed., 266; and *Hodgins v. Ont. L. & D. Co.*, 7 O. R. 202, and concludes on this point from the evidence and the reports, circulars, etc., of the Company, that it has been satisfactorily established that the Company has bound itself, apart from the statute, to pay ninety per cent. of its profits to the policy-holders. He then continued:—“The most

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difficult point to determine, and one that has given me much anxious consideration, is whether the amounts which the Company returns to the policy-holders every five years can be estimated as part of the income of the Company for the purposes of municipal taxation? Strong reasons can be given on both sides of this question. Many arguments can be advanced in favour of taxing these moneys, but just as many can be urged against it. I have searched in vain for any case in which the same question has arisen in our own Courts. So far as I know or can find out the question has not been up in this Province for judicial decision. The American cases do not assist us much, for in most of the States, so far as I can judge, by their systems of taxation the *corpus* of the fund would be that which would be singled out for taxation; nor do I find any American decision where this question has been before the Courts. Mr. MacKelcan has referred me to some American cases in support of the assessment. In the case of *Sun Mutual Insurance Company v. New York*, 8 N. Y., 241, cited to me, where a mutual insurance company was authorized to accumulate from its profits a fund to continue liable for its losses during the term of its existence, it was held that this accumulation was capital, and was liable to taxation as such. I was also referred to a note at page 160 of Cooley on Taxation, in which it is said: "Income means that which comes in and is received from any business or investment of capital, without reference to the outgoing expenditure." In *People v. Board*, 20 Barb. 81, it was held in the State of New York that the surplus reserve fund of mutual life insurance companies, incorporated previous to the year 1849, was liable to taxation as capital. None of these cases, it will be seen, touch the question here presented. The nearest approach to the point in dispute will be found discussed in the late English case of *Last* (Surveyor of Taxes), appellant, and the *London Assurance Corporation*, respondents, 12 Q. B. D., 389, decided on the 14th of March, 1884."

The learned judge then stated the facts, arguments and judgments fully in this case and proceeded:—"The junior judge, Mr. Justice A. L. Smith, expressed the opinion that the share going to the policy-holders was taxable and was in favour of giving judgment for the Crown, but as there was a difference of opinion and the Court was evenly divided, he withdrew his judgment and judgment in the case passed for the insurance company. I have searched in vain to find any trace of the case being brought up on appeal. We, therefore, have in that case the decision of the Government Commissioners against the Crown and their view

sustained by the decision of the Queen's Bench Division. Had not the Crown officers been satisfied with the correctness of that decision I have no doubt they would have taken the opinion of the Court of Appeal on the question, if that were possible. It may be, however, because there was no appeal."

But I am of opinion that the decision in the case last referred to would, according to the authorities in England, be binding on any Court of co-ordinate jurisdiction. On this point, I refer to the authorities collected in the opinion of Mr. Justice Patterson in our own Court of Appeal *In re Hall*, 7 A. R. 135. It is true that two of the judges give the opinion in that case, that in the Court of Appeal in this Province the same rule in respect to the withdrawal of the opinion of the junior judge should not be observed as is in the House of Lords, and that although disposing of the case such a decision cannot be cited as authority. The case in 12 Q. B. D. may be put thus:—"If there was no appeal from it, then, according to the rule in the House of Lords, the decision is authority; if there was an appeal from it the best evidence of its correctness is the fact, that there was no appeal. If there was a right of appeal, I cannot conceive why (unless satisfied of its correctness) the Crown did not further test the question in a higher Court."

It is laid down by all the writers of authority on the construction of statutes that all statutes imposing a pecuniary burden, whether by way of tax or otherwise, are subject to the rule of strict construction: Maxwell on Statutes, 259; Potter's Dwarries on Statutes, Chap. V., and subsequent chapters. It was laid down by the Court in the cases of *Hull Dock Co. v. Browne*, 2 B. & Ad. 59; *Nicholson v. Fields*, 7 H. & N. 810, 816; *Parry v. Croydon Gas Co.*, 11 C. B. N. S. 579; S. C., 15 C. B. N. S. 568 that such was the correct view to take of statutes imposing pecuniary burdens.

Maxwell lays down the rule in this way:—"The subject is not to be taxed unless the language by which the tax is imposed is perfectly clear and free from doubt. In a case of doubt the construction most beneficial to the subject is to be adopted." The opinion of Lord Lyndhurst in *Stockton Railway Co. v. Barrett*, 11 C. C. & F. 602, and per Parke, B., *In re Micklethwaite*, 11 Ex. 456 is cited for the latter proposition.

In this case I might decide the question by saying that the Legislature has not specifically provided for the taxation of that which it is here proposed to tax, and if I have a doubt, I should decide against the assessment. With the strong views advanced in support of both sides of the question, candour compels me to say I have doubts, and

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these will only be dispelled by an authoritative decision which I am bound to follow; but using the best judgment I can, in the light of Last's case, from which I have quoted so fully, and which I think is authority for me to follow, I hold that the amount going to the policy-holders is not income subject to assessment. I may say that in principle I see no difference between the English case of tax for general purposes of Government and here for municipal purposes.

Should the decision in Last's case be reversed and a different rule of taxation be declared, I will hereafter be free to follow that as the latest authoritative exposition of the law.

For these reasons I think the assessment for income should be reduced to \$29,926.84, the amount agreed on by Counsel in the event of my decision being as it is.

#### COUNTY COURT OF NORTHUMBERLAND AND DURHAM.

#### BURNHAM V. WILLIAMS.

• *County Court Practice—O.J.A., r. 425.*

Applications such as in the High Court of Justice are made on notice of motion in Toronto, may be made in the County Court on notice of motion.

*Brown v. McKensie*, 18 C. L. J. 203, approved to that extent.

But the Court will still allow such applications to be made by summons as under the practice before the Judicature Act.

[Cobourg, Nov.]

*W. R. Riddell*, for plaintiff.

*H. F. Holland*, for defendant.

CLARK, Co. J.,—This is an application on notice of motion to strike out certain paragraphs of the statement of defence. An objection has been made that the correct practice is that all such applications should, under Rule 425 of the O.J.A., be made by summons. My leanings are all in favour of this latter practice, but I cannot say that the law is clear that the former will not answer. The only reported case, *Brown v. McKensie*, 18 C. L. J. 203, which has been cited to me, is in favour of the practice by notice of motion. I shall, therefore, until corrected, give effect to either practice indifferently.

#### NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

#### CHANCERY DIVISION.

Boyd, C.]

[Oct. 22.]

GILLEN V. THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF KINGSTON IN CANADA.

*Mortgage—Custody of payments made to a solicitor  
—Agency—Adoption of payments.*

G., a mortgagor, left her mortgage in the office of McM., her solicitor and F., the mortgagor, paid the interest and \$3,000 on account of principal to McM. who paid over the interest but retained the \$3,000 without saying anything about it. F. subsequently paid a further sum of \$1,500 on account of principal and other sums of interest, all of which were paid over to G. In a mortgage suit by G. the defendants set up that McM. was the duly authorized agent to receive the sums paid him for principal and interest and it was contended that the subsequent receipt of the \$1,500 and interest by G. was an adoption of the previous payment.

*Held*, that the custody of a mortgage confers no right whatever to the custodian to receive any part of the principal or interest secured. A mortgage not only secures money but it affects the land and so for its effectual discharge not only payment but re-conveyance is essential and for this reason the law does not infer a right to receive the money from the mere possession of this kind of security.

The adoption of a later payment of principal cannot be held to ratify a prior unknown payment unless, possibly it could be shown that there was an intention to adopt all the payments or that the position of the mortgagor was altered for the worse.

*Cassels*, Q.C., for plaintiff.

*Moss*, Q.C., and *Burdett*, for defendants.

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Boyd, C.]

[Oct. 22.]

## WELLS v. TRUST AND LOAN COMPANY.

*Mortgagor and Mortgagee—Accounting—Surplus after sale under mortgage—Reasonable expenditure.*

Appeal from report of the Master-in-Ordinary.

Mortgagees of lands in Ontario, held a collateral mortgage on lands in Kansas.

Default occurring they sold the lands in Ontario, employing W., a land agent, to effect the sale; W. acted also under a power-of-attorney from the mortgagor, who had agreed to a commission being allowed to him for selling.

*Held*, on action for an account brought by an execution creditor, who obtained his execution after the power-of-attorney had been given to W., and after the said agreement as to commission, that the payment of the commission was a proper item to allow the mortgagees in their account.

After the mortgage on the Kansas lands had been executed, the mortgagees discovered that the lands comprised in it had been sold for taxes and that there were also several executions against them, and they incurred expenses in staying the executions, and setting aside the tax sale. The mortgagor had approved of these proceedings being taken.

*Held*, that these expenses ought also to be allowed to the mortgagees in their accounts, for whatever bound the mortgagor, in taking the accounts, bound the plaintiff to the same extent. The plaintiff had no lien on the Kansas lands; his equity was to have the accounts taken as to these lands in order to marshal the defendants' securities for his benefit.

The mortgagees further incurred expenses in prosecuting unsuccessful litigation arising out of a seizure made by them under the power of distraint in their mortgage. The mortgagor did not sanction this litigation, (see *Trust and Loan Company v. Lawreson*, 45 U. C. R. 178, 6 A. R. 286).

*Held*, that this expenditure could not be allowed. The general rule is that the mortgagee is not allowed to add to his mortgage debt the costs of unsuccessful proceedings at law instituted by himself and not undertaken with the approval of the mortgagor.

Boyd, C.]

[Nov. 26.]

## YOST v. ADAMS.

*Will—Direction to pay debts—Executor's power to sell lands not devised—R. S. O. ch. 107, sec. 19.*

Appeal from the Master's report.

A testator by his will directed his executors to pay his debts, etc., and then proceeded: "The residue of my estate and property which shall not be required for the payment of debts, I give and devise and dispose of as follows." Certain lands were not mentioned.

*Held*, that, nevertheless, the executors could give a good title to them to a purchaser, for the above words clearly imported an intention that the debts should be paid first out of the estate and property of the testator. This created a charge of the debts upon his lands, and the mere failure of the testator to enumerate all his lands in the subsequent part of the will, by which there was an intestacy as to the part in question in this action, did not detract from the conclusion that all the lands were so charged. The direction that his debts should be paid by his executors, conferred an implied power of sale upon them for the purpose of paying the debts out of the proceeds.

*Held*, also, that apart from the above, R. S. O. ch. 107, sec. 19, covered the case. The testator had not indeed within the meaning of that section devised the real estate charged in such terms as that his whole estate and interest therein had become expressly vested in any trustee, but he had devised it to such an extent as to create a charge thereon, which the Act in effect transmutes into a trust, and thereupon clothes the executor with power to fully execute that trust by conveying the whole estate of the testator.

*Moss*, Q.C., for the appeal.

*H. J. Scott*, Q.C., contra.

Q. B. Div.—Com. Pleas.

NOTES OF CANADIAN CASES.

[Prac.]

## QUEEN'S BENCH DIVISION.

[Nov. 21.]

## HILLIARD V. ARTHUR.

The decision of Rose, J., 10 P. R. 281, was affirmed.

*Clement*, for the appeal.

*Aylesworth*, contra.

[Nov. 24.]

## FRIENDLY V. MEDLER.

The decision of Rose, J., 10 P. R. 267, was affirmed.

*Walter Read*, for appeal.

*Wallace Nesbitt*, contra.

## COMMON PLEAS DIVISION.

Rose. J.]

[July 23.]

## QUEEN V. NUNN.

*Conviction—Certiorari—Return—Recognizance—Negating exception—By-law—Ultra vires—Evidence.*

Writs of *habeas corpus* and *certiorari* having been issued under R. S. O. c. 70, sec. 8, and returns made, a motion was made to file the returns.

*Held*, that the return to the *certiorari* is made for the assistance of the court, and that it is not necessary to enter into a recognizance. The returns having been filed, a motion was made for the discharge of the prisoner.

The conviction was for, "that the said Nunn, etc., did at London, etc., beat a drum on a public street called Dundas Street in said city, contrary to a by-law of said City of London, No. 179, etc."

The by-law provided (sec. 2) that "no person shall in any of the streets, or in the marketplace of the City of London blow any horn, ring any bell, beat any drum, play any flute, pipe or other musical instrument, or shout, or make, or assist in making any unusual noise, or noise calculated to disturb the inhabitants of the said City."

"*Provided* always that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty's regular army, or any branch thereof, or of any militia corps, lawfully organized under the laws of Canada."

*Held*, that it was not necessary to negative, in the conviction or commitment, the exception contained in the above proviso.

The statutory provision under which the above by-law was passed, (47 Vic. ch. 32, sec. 14, sub-sec. 12 O.), gives power to municipal councils to pass by-laws "for regulating or preventing the ringing of bells, blowing of horns, shouting and other unusual noises, or noises calculated to disturb the inhabitants."

No evidence was given on behalf of the prosecution to shew that the noise made by beating the drum was unusual and evidence on behalf of the prisoner was refused.

*Held*, that, as beating a drum is not mentioned in the statute, the by-law, so far as it seeks to prohibit the beating of drums simply, without evidence of the noise being unusual or calculated to disturb is *ultra vires* and invalid.

*Held*, also, that the evidence should have been received on the prisoner's part.

Prisoner discharged.

*McMichael*, Q.C., and *R. M. Meredith*, for motion.

*Osler*, Q.C., and *T. G. Meredith*, contra.

## PRACTICE.

Boyd, C.]

[Nov. 17.]

## BINGHAM V. MCKENZIE.

*Changing venue—County Court action—Jurisdiction of Master in Chambers.*

On an appeal from the order of the Master in Chambers, his jurisdiction to make an order changing the venue in a County Court action was doubted, and the order of the Master was also reversed on the merits.

*Morson*, for the appeal.

*Shepley*, contra.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Boyd, C.]

[Nov. 17.]

FUCHES v. HAMILTON TRIBUNE COMPANY.

*Winding up order—Preferential claim for rent.*

On a reference for winding up the defendants under the Act 45 Vic., (D.) cap. 23, the local Master at Hamilton disallowed a claim made by the landlords of the defendants to be paid preferentially for nine months' overdue rent.

On appeal from the local Master, *Held*, that the rent having been overdue at the date of the commencement of the winding up proceedings and no steps having been taken by the landlords to assert their lien for rent till after that date, the Court will not aid the landlord.

Decision of the Master affirmed with costs.

*Walker*, for the appeal.

*Carscallen*, contra.

Boyd, C.]

[Nov. 17.]

LANGTRY v. DUMOULIN.

*Appeal from taxing officer—Certificate—Objections—Filing.*

An appeal from a taxing officer. The taxation was completed and the officer signed his certificate of the result on the 14th October. This certificate was not filed. On the 15th of October the officer issued a certificate to the appellant of the objections which had been made to his taxation upon which the appeal was based.

On objections taken to the appeal,

*Held*, that until the certificate was filed no proceedings could be taken under it or for the purpose of complaining of it. The officer erred when he certified *ex parte* after he had signed the certificate, as he was *functus officio* after making that certificate. The proper course was for the officer to include in his certificate the points of objection to his taxation.

*Arnoldi*, for the appeal.

*Alfred Hoskin*, Q.C., and *E. Douglas Armour*, contra.

Boyd, C.]

[Nov. 18.]

SWEETMAN v. MORRISON.

*Interpleader—Sheriff's costs—Security.*

*Held*, (on appeal by the claimant in an interpleader matter from the order of the Master in Chambers) that sec. 10 of the Interpleader Act, R. S. O. 50, authorizes security to be ordered for the sheriff's costs only in circumstances where it would be ordered as between ordinary litigants. The circumstances that the claimant was a married woman and in straitened circumstances, are not sufficient to warrant an order for security for the sheriff's costs from her.

*H. J. Scott*, Q.C., for the appellant.

*Aylesworth*, for the sheriff, and *Shepley*, for the ex-creditor, contra.

Boyd, C.]

[Nov. 19.]

RE ARMOUR, MOORE v. ARMOUR.

*Administration—Representation in this Province—Real estate—Necessary application.*

Upon a summary application for an order for the administration of the real and personal estate of the testator who died in Michigan, and whose will was proved there.

*Held*, that the practice of the Court is opposed to granting administration where representation has not been obtained in this country to the estate sought to be administered, unless, for one thing, it is very clearly established that there is no personal estate of the deceased within the jurisdiction in respect of which auxiliary letters probate could be obtained.

It is possible in this country to have an administration of the real estate without a general administration in a very special case, but that should be made upon pleadings and not by way of summary application.

*Justin*, for the motion.

*Masten*, contra.

Prac.]

NOTES OF CANADIAN CASES—FLOTSAM AND JETSAM.

Boyd, C.]

[Nov. 19.]

## LAVERY v. WOLFE.

*Production of papers on examination for discovery.*

A motion to commit the plaintiff for not producing certain papers on his examination before a special examiner under the Chancery General Orders still in force, 138, 140. The plaintiff was served with a subpoena *ad test.* with a special clause therein requiring him to produce certain letters, books and documents at the time and place appointed for examination, but failed to produce the required papers.

*Held*, that the endeavor to combine the two methods of discovery (examination of parties and production of documents) by means of an examination and a subpoena *duces tecum* is not to be encouraged by treating non-production as a contempt. The proper course was to have had the examiner direct what should be produced and to have adjourned the examination for the purpose of procuring the documents.

*O'Heir*, for the motion.

*Clement*, contra.

Osler, J. A.]

[Nov.]

## QUEEN v. WALKER.

*Holman*, moved on behalf of David Walker for leave to put in recognizance *nunc pro tunc*. It appeared that no recognizance had been entered into before the return of the writ of *certiorari* by the Clerk of the Peace. An order *nisi* to quash the conviction had been granted and issued but not served. The affidavit in support of the motion showed that before writ of *certiorari* had been applied for the convicting magistrates had refused to take the recognizance of the defendant.

OSLER, J. A., referred to the case of *King v. The Inhabitants of Abergale*, 5 A. & E., page 795, and ordered "that the return of the writ of *certiorari* be enlarged, and the writ sent back to the Clerk of the Peace in order that it might be duly returned after the defendant shall have entered into a proper recognizance with sufficient sureties pursuant to the Statute in that case made and provided."

## FLOTSAM AND JETSAM.

It is announced that the Queen has been pleased to confer upon the Right Honorable Sir John Macdonald the distinction of Knight Grand Cross of the Order of the Bath, in recognition of his eminent services to Canada and the empire. The *Gazette* (Montreal) says: "The occasion selected for the bestowal of this mark of great honor is most fitting, the fortieth anniversary of Sir John's entrance into public life. The dignity is an exalted one. The Order of the Bath is one of the most ancient and honorable in heraldry, and though it fell into disuse for a time in the seventeenth century, it was revived by George I. in 1725, and is now the second order in rank in England, the first being the Garter. By the statutes then framed for the government of the order, it was declared that besides the sovereign, a prince of the blood, and a great master, there should be thirty-five knights. The order was exclusively a military one down to 1847, when it was placed on its present footing by the admission of civil knights, commanders and companions. The order is divided into three classes, and it is to the first of these, that of the grand cross, that Sir John Macdonald has been raised, he having previously been decorated with the second class, that of Knight Commander. The civil list of the first class is limited to twenty-five, and Sir John's promotion leaves still one vacancy in the number. Among those upon whom the honor has been conferred in recent years are such distinguished men as Lord Dufferin, Sir Edward Thornton, Sir Bartle Frere, the Earl of Lytton, Sir Stafford Northcote, Lord John Manners, Sir Robert Peel, the Marquis of Hertford, Earl Sydney, and Viscount Halifax.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

## TRINITY TERM, 1884.

During this term the following gentlemen were called to the Bar:—Samuel Clement Smoke, William Durie Gwynne, Stephen Frederick Washington, Thomas Thomson Porteous, Alexander Duntroon McIntyre, Matthew Munsell Brown, William Grant Thurston, Thomas Edward Williams, John Stewart, Napoleon Antoine Belcourt, George Washington Field, Francis Henry Keefer, Douglas Armour, Flavius Lionel Brooke, Alexander Carpenter Beasley. The names are arranged in the order in which the candidates were called.

The following gentlemen were admitted as students-at-law:—Graduates, James Morris Balderon, Alexander Robert Bartlett, Joseph Hetherington Bowes, Samuel William Broad, George Filmore Cane, John Coutts, George Henry Cowan, Robert James Leslie, Archibald Foster May, John Mercer McWhinney, James Albert Page, Horatio Osmond Ernest Pratt, Thomas Cowper Robinette, Robert Karl Sproule, Ernest Solomon Wigle, James McGregor Young, Roderick James MacLennan, George Frederick Henderson, Samuel Walter Perry, Richard S. Box, William Wallace Jones, William Louis Scott, Edmund Kershaw. Matriculants: Henry Herbert Johnston, Albert E. Baker, Herbert Holman, Charles D. Macaulay, George Albert Thrasher, John Williams, Seymour Corley. Junior Class: Henry Elwood McKee, Edward Lindsey Elwood, Walter Scott MacBrayne, Edwin Owen Swartz, Joseph Frederick Woodworth, Owen Richards, William Allan Skeans, Richard Lawrence Gosnell, Frederick Ernest Chapman, Nathaniel Mills, James McCullough, jun'r., John McKean.

The following gentlemen passed the examination of Articled Clerks:—John Alfred Webster, Alexander William McDougald.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

## Articled Clerks.

- 1884 and 1885.
- Arithmetic.
  - Euclid, Bb. I., II., and III.
  - English Grammar and Composition.
  - English History—Queen Anne to George III.
  - Modern Geography—North America and Europe.
  - Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

## Students-at-Law.

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## OF NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

## First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

## Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

## LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchor, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

**F E E S .**

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above .....	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

*Copies of Rules can be obtained from Messrs. Rowse & Hutcheson.*

# Canada Law Journal.

VOL. XX.

DECEMBER 20, 1884.

No. 22.

## DIARY FOR DECEMBER.

- 15. Mon.....Christmas vacation in Supreme Ct. and Exchequer Ct. begin. Morrison, J., sworn in Ct. of Appeal, 1877.
- 18. Tues.....First Lower Canada Parliament met, 1792.
- 21. Sun.....4th Sunday in Advent.
- 22. Mon.....Shortest Day.
- 24. Wed.....Christmas vacation, H. C. J., begins.
- 25. Thur.....Christmas Day.
- 26. Fri.....Upper Canada made a Province, 1791.
- 27. Sat.....Spragge, V.-C., appointed Chancellor, 1879.
- 28. Sun.....1st Sunday after Christmas.
- 31. Wed.....Revised Statutes of Ontario came into force, 1877.

TORONTO, DECEMBER 20, 1884.

WE have delayed issuing the present number in order that we send with it the Index and Table of Cases, etc., for the past year. The usual sheet Almanac for the coming year will shortly be distributed amongst subscribers.

It has been the custom in this country for some time past, sanctioned, as we conceive, by sufficient authority to prefix the title of "His Honour" to the word Judge in describing our County judges. It has been thought proper in England to issue a proclamation, published in the *St. James Gazette*, declaring the royal will and pleasure that the judges of the County Courts in England and Wales shall be known and addressed as "His Honour," and shall have precedence next after Knights Bachelor.

THE Canadian Bar has suffered a great loss in the death of Mr. James Bethune, Q.C. It was hardly known that he was seriously ill when his death was announced. He died on the 19th instant, in the forty-fifth year of his age. The universal expression of regret amongst his brethren of the profession found an immediate echo

in the lay press. He was taken away in the prime of life, just as he had won for himself a name which will not soon be forgotten, whether we look upon him as a lawyer of talent and learning, as an honest politician, as a warm-hearted, genial friend, or a citizen of high honour and stainless reputation. He was a man of great simplicity of character; in his home-life loving and gentle. An earnest worker in the church to which he belonged, he carried his Christianity into his everyday life. He will be missed by all who knew him.

Mr. Bethune was born in Glengarry on the 7th July, 1840. He was called to the Bar in 1862, and elected a bencher in 1875. The early part of his professional life was spent in Cornwall where, for five years, he held the position of County Attorney. In 1872 he was elected to serve as member for Stormont in the Legislative Assembly, of which he was a useful, conscientious member. He was elected again in 1875, but his heart was in his profession, and his large and increasing counsel-business taxing to the utmost his industry and energy, he ceased during the past few years to take much part in politics.

## SEDUCTION.

THE case of *McKersie v. McLean*, 6 Ont. R. 428, although one, from the circumstances disclosed in the evidence, not calculated to arouse any feeling of regret that it should have failed, is nevertheless a very striking illustration of the absurd condition of the law relating to actions for damages for the seduction of females. The person alleged to have been seduced was an

## RECENT ENGLISH DECISIONS.

orphan, and the action was brought in the name of her grand-uncle who stood in *loco parentis*. The alleged seduction took place whilst the girl was employed as a servant at the house of defendant's brother-in-law. The court held that the only person who could bring the action was the defendant's brother-in-law; which is of course tantamount to saying, that, under such circumstances seduction may take place with impunity. It is high time that the form of action for seduction, as at present recognized by the law, should be abolished altogether, and instead of it, a right of action given directly to the party seduced; or else let it be made a criminal offence as it is in some other countries.

## RECENT ENGLISH DECISIONS.

PROCEEDING with the November numbers of the *Law Reports*, the cases in 27 Ch. D. p. 1-361, next have to be examined.

## COVENANT—LEASE—"BUSINESS."

The first case calling for notice is *Rolls v. Miller*, p. 71, wherein the Court of Appeal upheld Pearson, J., in holding that a charitable institution called a "Home for Working Girls," where the inmates were provided with board and lodging, was, whether any payment was taken, or not, a business within the meaning of a restrictive covenant in a lease whereby the lessee covenanted not to "exercise, or carry on, or permit . . . upon the premises hereby demised, any trade or business of any description whatsoever." The words of Pearson, J., at p. 78, may be quoted as, on the whole, expressing the opinion of all the judges, and as affording a useful criterion of what a "business" is, as to which there appears to be little authority. He says: "For every purpose for which I can see that the home is to be used, with the single exception of young women actually lodging and boarding there, they are purposes quite outside

the ordinary domestic life of persons. The home is not to be replenished with guests, as the Solicitor-General said, in the ordinary way in which a person invites guests to his house. It is the public who are invited—so much of them as are young women of fifteen to twenty-five who want a home. They are invited to come and ask to be admitted, which is what your guest commonly does not do. They are to be received, not in the ordinary way in which a person receives his guests, but they bring a testimonial of respectability, and, of course, they bring proof of their want of accommodation. Under all these circumstances, I think it is absolutely diverse from and outside the domestic life of a home, and if I was to add anything to the unsuccessful attempt I formerly made to define "business," I should say that is a business which is carried on by any person in addition to, and diverse from, his ordinary domestic life, and this, to my mind, is something which is carried on by the society, not being ordinary domestic life at all, but being a business for which they solicit subscriptions, and which they carry on by means of these subscriptions.

## VENDOR AND PURCHASER—FORFEITURE OF DEPOSIT.

The next case, *Howe v. Smith*, p. 89, is a very interesting decision of the Court of Appeal, affirming as it does, the right of a vendor of real estate, in the absence of express stipulation to the contrary, to retain the deposit paid by the purchaser, when the latter has, by his conduct, not only deprived himself of all right to specific performance, but also to damages, and has given the vendor the right to say that he has receded from, and repudiated the contract. It is not necessary here to do more than mention that in the contract in question the land was expressed to be sold "for the price of £12,500; £500 part thereof having been paid on the signing of this agreement as a deposit and in part

## RECENT ENGLISH DECISIONS.

payment of the purchase-money." There was no further provision in the contract in reference to the deposit. Fry, L. J., at p. 100, says: "What is the meaning of this expression, 'a deposit, and in fact, payment of the purchase-money?' The authorities seem to leave the matter in some doubt. . . . These authorities appear to afford no certain light to answer the inquiry whether, in the absence of express stipulation, money paid as a deposit on the signing of a contract can be recovered by the payer if he has made such default in performance of his part as to have lost all right to performance by the other party of the contract, or damages for his own non-performance. Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the contract." In the same way, at p. 95, Cotton, L. J., says: "What is the deposit? The deposit, as I understand it, . . . is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if, on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then . . . he can have no right to recover the deposit."

## SALE OF GOOD-WILL—RIGHT TO SOLICIT OLD CUSTOMERS.

The case of *Pearson v. Pearson*, p. 155, has next to be noticed, and is of much interest, inasmuch as it is a decision of the Court of Appeal over-ruling *Labouchere v. Dawson*, L. R. 13 Eq. 322, wherein Lord Romilly laid it down that the seller of a business, with its good-will, may, in the absence of any express agreement to the contrary, carry on the same business wherever he pleases, and solicit customers in any public manner, but that he must not apply to any of the old customers privately by letter, personally, or by traveller, asking them to continue their custom with him and not to deal with the vendees. The Court of Appeal now held that there is nothing in the sale of a good-will to prevent a man soliciting his old customers to deal with him. Thus Cotton, L. J., says, p. 157: "Lord Romilly rests his decision in *Labouchere v. Dawson* on the principle that a man cannot derogate from his own grant. But it is admitted that a person who has sold the good-will of his business may set up a similar business next door and say that he is the person who carried on the old business, yet such proceedings manifestly tend to prevent the old customers going to the old place. I cannot see where to draw the line; if he may by his acts invite the old customers to deal with him, and not with the purchaser, why may he not apply to them and ask them to do so? I think it would be wrong to put such a meaning on 'good-will' as would give a right to such an injunction as has been granted in the present case." It is to be noticed, however, that Lindley, L. J., dissents from his colleagues. He says, p. 159: "It is true that *Labouchere v. Dawson* went beyond the preceding cases, but did it go beyond them so far as to be wrong? It went on the principle that a person who has sold the good-will of his business shall not

## RECENT ENGLISH DECISIONS.

derogate from his own grant by doing what he can to destroy the good-will which he has sold. It is true that if this principle were logically carried out, it would prevent the vendor from carrying on the same sort of business as he has sold; and if the courts had held that he could not, I do not think that the decision could have been complained of. It startles a non-lawyer to be told that if he buys a business and its good-will the seller can immediately enter into competition with him next door. The courts, however, have held that this can be done; but I think that Lord Romilly was right in not applying this doctrine to a case where the vendor directly applies to his old customers to induce them to continue dealing with him instead of with the purchaser. Sir George Jessel and the Lord Justice Lush were of the same opinion, but I believe there are other judges besides my learned brothers who think the decision in *Labouchere v. Dawson* wrong."

## ALIMONY—INALIENABILITY OF.

The next case of *In re Robinson*, p. 160, is to be noted on account of the opinions therein expressed as to alimony being inalienable. Baggallay, L. J., says: "In the ecclesiastical court it is the practice to vary or stop the payment of alimony according to the position or conduct of the wife, and if it were necessary to give an opinion on the question, I should be inclined to decide that alimony was not alienable." Lindley, L. J., says: "The question whether alimony is assignable has never been distinctly decided; but the nature of alimony has been often discussed, and there are cases which, in my opinion, tend to show that it is not alienable." Cotton, L. J., speaks with more positiveness. He says: "The very nature of alimony is inconsistent with its being capable of assignment. We are familiar with instances of allowances which are not alienable in the case of men, such

as the half-pay of the officers in the army and navy, which are given them in order that they may maintain themselves in a sufficient position in life to enable them to be called out for future service if required. Although alimony is not the same thing, it is governed by the same principle. Alimony is an allowance which, having regard to the means of the husband and wife, the court thinks right to be paid for her maintenance from time to time, and the court may alter it or take it away whenever it pleases. It is not in the nature of property, but only money paid by the order of the court from time to time to provide for the maintenance of the wife. Therefore, it was not assignable by the wife. How far she might dispose of the arrears or of her savings is a different matter; here the question is whether she can deprive herself of the benefit of it by anticipation." We may mention that in our own courts, in the case of *Raffenstein v. Hooper*, 36 U. C. R. 295, it was decided in 1875 that a bond given to a trustee by a husband, and his surety to secure payment to the wife, in pursuance of a decree of the Court of Chancery, was not assignable by the trustee and the wife, such assignment being contrary to public policy, and tending to lessen the inducement to reconciliation.

## VENDOR AND PURCHASER—CONDITIONS OF SALE—RIGHT TO RESCIND.

At p. 172 is a case of *In re Dames and Wood*, which shows the position of a purchaser who has stipulated for the right to rescind a contract of sale, if the vendor makes requisition which he is unable or unwilling to comply with. The following extract from the judgment of Bacon, V.-C., shows the effect of the decision: "No doubt this is a case of some importance. A man has an estate to sell, and he takes care to stipulate in the contract that 'if the purchaser shall take any objection, or make any requisition as to the title, evi-

## RECENT ENGLISH DECISIONS.

dence or commencement of title, conveyance or otherwise, which the vendor is unable or unwilling to remove or comply with, the vendor may, by notice in writing, rescind the contract; and then the vendor is to repay the deposit money and to retain the papers in his possession.' Now what is the meaning of being 'unable or unwilling' in the contemplation of the vendor? He knows it is possible that captious, unreasonable and minute requisitions may be tendered, and he protects himself on two grounds. He says:—'I may be unable or I may be unwilling.' He may wish to protect himself against being compelled to take the trouble, or to incur the expense of removing an objection. . . . The unwillingness is as much a part of the contract as the inability. The vendor, having reserved to himself the right of saying that he is unwilling, nobody has a right to inquire why he is unwilling. He says in effect, 'If I comply with your request I shall have to go here and there and find out the means of answering your requisition, and I am unwilling to take the trouble; therefore I protect myself by this condition.' That is the plain sense and meaning of the contract."

## LETTERS OF ADMINISTRATION—SUPPRESSION OF WILL.

The next case requiring notice is *Boxall v. Boxall*, p. 220, wherein it was decided by Kay, J., that a grant of letters of administration obtained 'by suppressing a will containing no appointment of executors was not void *ab initio*; and accordingly a sale of leaseholds by an administratrix who had obtained a grant of administration under such circumstances to a purchaser who was ignorant of the suppression of the will, was upheld, although the grant was revoked after the sale. It is pointed out that the fact that no executors were appointed by the will makes all the difference, and distinguishes the case from *Abram v. Cunningham*, 2 Lev. 182, wherein

it was decided that where administration was granted on concealment of a will which appointed executors, the grant was void from its commencement, and all acts performed by the administrator in that character were equally void, and could not be made good though the executor should afterwards appear and renounce. "In it," says Kay, J., "reliance was placed chiefly on the fact that the concealed will had appointed executors, who therefore had a right of property vested in them before probate, and this I gather was the ground of the decision."

## INJUNCTION—INNOCENT INFRINGER—COSTS.

Of *Wittman v. Oppenheim*, p. 260, it may be worth while to note in passing that Pearson, J., there held that an infringer of a design registered under the Patents, Designs and Trade Marks Act, 1883, though he acted innocently without *mala fides*, or any intention of being dishonest, must nevertheless pay the costs of a motion for an injunction to restrain him from infringing, though the plaintiff had given him no notice of the infringement before serving him with the writ in the action. He says, p. 268:—"It is said that the plaintiffs issued their writ without notice to the defendant, and that the defendant, as soon as he had notice of the plaintiff's title, did his best to undo what he had done. But, at the same time, I cannot say that the plaintiffs were wrong in issuing their writ without notice, and after that the only offer which the defendant could properly make was to submit to an injunction and pay the costs."

## LANDS CLAUSES ACT—PURCHASE OF LUNATIC'S LANDS.

Of *In re Tugwell*, p. 309, it may be briefly remarked that it decides, what the judge, Pearson, J., says would appear almost too plain for argument, were it not for a case of *ex parte Flamant*, 1 Sim. (N.S.) 260, that the Lands Clauses Consolidation Act, 1845, sec. 7, which corresponds to

## RECENT ENGLISH DECISIONS—OUR ENGLISH LETTER.

our R. S. O. c. 165, sec. 13, does not authorize a person of unsound mind to sell land to a company or public body who have statutory power to take it; the section only authorizes the committee of a lunatic to sell.

## RETIREMENT OF TRUSTEE—APPOINTMENT BY CONTINUING TRUSTEE.

In *In re Norris, Allen v. Norris*, p. 333, Pearson, J., decides the question—"Is it the case that, where there are two trustees, and one of them wishes to retire, the continuing trustee (*i.e.*, the trustee who intends to continue to be a trustee of the instrument) cannot appoint by himself, but must have the concurrence of the trustee who is actually retiring?" In the negative, he says, p. 339:—"With all respect to the judgment of Bacon, V.-C., in *In re Glenny and Hartley*, 25 Ch. D. 611, I cannot think that the words 'continuing trustee' in the ordinary form mean a trustee who is desirous of retiring and intending to retire *instantly*, because, as I recollect it, it used to go on to say, 'thereupon the trust premises shall be conveyed so that they may vest in the new trustees and the continuing trustee.' That shows that the 'continuing trustee,' in whom the trust premises are to rest jointly with the new trustee, cannot be the trustee who is then about to retire, but that the words 'continuing trustee' mean, not the retiring trustee, but the trustee who intends to remain a trustee of the instrument." A. H. F. L.

## OUR ENGLISH LETTER.

(From our own Correspondent.)

THE monotony of life in the London law courts has been relieved of late by two legal entertainments of such general interest that Mrs. Weldon and Mr. Bradlaugh sink into comparative insignificance.

And first of *Finney v. Garmoyle*. In spite of the rumours that nothing exciting was to be revealed in the course of this

case the public flocked down to the law courts at an early hour, and, in the result, was by no means so disappointed as might have been expected. It is true that Lord Cairns' fickle son was away on the Continent, and that the case was settled out of court, but Mr. Charles Russell made a speech in which he gave a glowing account of the career of the Savoy actress, and the Attorney-General made a touching apology on behalf of Lord Garmoyle. The court, crowded to suffocation, had the further pleasure of hearing the colossal damages, £10,000 stated by these high authorities, and the assembly dispersed, not altogether displeased with its entertainment of the day. One of the natural results has been that the lay press has produced a variety of articles more or less profound upon the subject of breach of promise, and there can be no doubt that Sir Henry James's famous one-line Bill—"that actions for breach of promise of marriage be no longer maintained at law"—is proved by the popularity of Garmoyle's case to be, to say the least of it, premature. When the public unfeignedly rejoices that an injured woman has obtained £10,000 as a salve to her wounded feelings, the times are not quite ripe for the abolition of the form of action which gave the injured woman her remedy.

But the excitement concerning *Finney v. Garmoyle* was not a circumstance to that which attended the famous trial of *Adams v. Coleridge*. The facts of this case may be summarized exceedingly shortly. The Hon. Bernard Coleridge did not wish to see his sister married to Mr. Adams, and accordingly wrote his sister a letter containing a string of accusations against Mr. Adams, upon which this gentleman founded an action for libel. The defence was that the communication was privileged, and Mr. Justice Manisty ruled that, unless there was evidence of express malice, this defence must prevail. But

## OUR ENGLISH LETTER.

the jury were decidedly of opinion that there had been clear vindictiveness, and assessed the damages at £3,000; the verdict was reversed by the presiding judge who entered judgment for the defendant with costs.

This is a skeleton survey of the details of the case which has set the whole world talking about Mr. Justice Manisty in one tone, which tone is unfavourable to his Lordship. There is no doubt that he has opened himself to the imputation of partiality, and in fact, he has been accused of this failing in more than one quarter. Yet there is not on the whole English Bench a man more scrupulously impartial and laboriously painstaking than Mr. Justice Manisty, and there can be no doubt that he gave his ruling as calmly in the case of Lord Coleridge's son as if the libel had been published by a grocer's assistant. In ordinary cases, too, this practice of allowing the jury to give a verdict before deciding upon the question of privilege may be more or less commended in tending to put a stop to litigation, or rather, to curtail the proceedings in a suit once begun. But Mr. Justice Manisty erred in failing to see that the case was exceptional, and that it was a matter of essential importance to follow the ordinary rules with exceptional rigour. Nor, on the whole, was his conduct of the whole case entirely satisfactory. He was evidently extremely distressed at the character of the circumstances, and it is undoubtedly a sad thing to see the dirty linen of the Lord Chief Justice's family washed in public; but the linen was not, after all was said and done, very dirty, and there is a strong feeling that the presiding judge was not justified in flinging in open court at the plaintiff's head a suggestion that the case should be referred to a private person of eminence for settlement. Mr. Adams preferred the verdict of a jury, and the result shows that his judgment was prudent.

There is apparently a considerable prospect of a reform in the law so far as it affects sentences. For some time past all, except deep-dyed humanitarians, have been complaining that offences against the person are punished far too lightly, unless they are accompanied by robbery. The judges themselves deplore their inability to cope with ruffianism when it is not mercenary; and when assaults are followed by theft the application of the lash has become an almost invariable rule. In addition to this the press clamours that the judges ought to be endowed with a wider discretion in the assignment of punishment, and the public is of the same opinion.

The place amongst the Benchers of the Inner Temple, vacated by the death of Mr. Justice Watkin Williams, is filled by Mr. A. R. Jelf, Q.C., a man who has made for himself a considerable, if not a very great name as a lawyer, and who is also the best of company, which, from the Benchers' point of view, is naturally important. I am not aware that there is any other piece of personal news to be detailed, except that by the death of Judge Longfield the Irish Bar has suffered a loss for which it refuses to be comforted, even by the advent of Mr. Healy, M.P., who has just been called to the Irish Bar amid a flourish of rather small trumpets, any one of which would cost at least a dozen of champagne, if brought home to him at any English circuit mess.

*London, November 29th.*

Q. B. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

**NOTES OF CANADIAN CASES.**PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.**QUEEN'S BENCH DIVISION.**

Osler, J. A.]

**MACLAREN V. COMMERCIAL UNION ASS.  
COMPANY.***Fire insurance—Damage by removal of goods—  
Salvage.*

The plaintiff's stock in trade was insured against loss by fire in the defendant Company. A fire occurred in an adjoining building, and the plaintiff's warehouse being in danger of destruction, he removed his stock which was thereby damaged, and some of it lost.

*Held*, that there was a loss covered by the policy, and no salvage to which the defendants were liable to contribute under the fifth statutory condition; which declares that in case of removal of the property to escape conflagration the Company will ratably contribute to the loss and expenses attending such act of salvage.

REGINA V. YOUNG.

*Liquor License Act—Conviction by two magistrates—Onus of proving license—Imprisonment  
in default of distress—Selling liquor to Indian.*

A conviction under R. S. O. cap. 181, for selling liquor without a license, purporting to be made by three magistrates, but signed by two only, was returned with a *certiorari*.

*Held*, if an objection at all, a ground for sending back the writ, that the third magistrate might sign the conviction, but not a ground for quashing it.

By R. S. O. cap. 181, sec. 85, where the act or omission complained of is one for which, if the defendant were not duly licensed, he would be liable to a penalty under the Act, the burden of proving that he is licensed is on the defendant:

*Held*, no objection to a conviction, that it did not show the defendant was not licensed.

A penalty of thirty days' imprisonment in

default of sufficient distress for the fine imposed:

*Held* good under sections 51 and 59 of the Act.

That the offence was selling liquor to an Indian:

*Held*, no objection to a conviction under R. S. O. cap. 181; for, if so, the defendant was guilty of two offences, one under the latter Act and one under the Indian Act.

*Beck*, for motion.

**CHANCERY DIVISION.**

Boyd, C.]

[Nov. 26.]

**LABATT V. CAMPBELL.***Will—Devise to charities—Mortmain—Failure  
of bequests—Incorporated synods—Power to hold  
in mortmain.*

R. P. L., by his will, directed his executors by and out of the moneys which shall be received by them from the P. B. and M. Co. for or on account of the debt or sum of \$35,000 owing and secured by mortgage by that company to me at the time of my decease, and of the interest, sums of which shall accrue after my decease; in the first place to pay the sum of \$1,500 part thereof to the Bishop, for the time being, of Algoma, in Canada, to be invested by him in or upon any of the investments hereafter authorized with power for the Bishop of Algoma aforesaid, for the time being, from time to time to vary and transpose the investments thereof at his discretion for any other or others of the kind prescribed, and the income of such investments to be applied in and for the education and qualifying of John Eskinah, an Algoma Indian, at present of the Shingwauk Home, Sault Saint Marie, Algoma, aforesaid (heretofore supported by me), as and for a missionary in the Diocese of Algoma aforesaid, for and during and until such time as the Bishop of the said Diocese, for the time being, shall consider sufficiently qualified for such purpose, and upon and after the completion of such education and qualifying, to apply such income as aforesaid forever thereafter, from time to time, in and for the education and qualifying of some other person

Chan. Div.]

NOTES OF CANADIAN CASES.

[Prac.

to be nominated by such Bishop, for the time being, for a like purpose, and during such time as he shall think proper, but for which applications the trustees and executors shall not be responsible. And after payment of the aforesaid legacy I give and bequeath the following legacies to be paid out of the same fund or money, namely:—

To the Treasurer, for the time being, of the Algoma Mission in British America, the sum of \$1,500, of Canadian currency, for the benefit of those Missions.

To the Treasurer, for the time being, of the Huron Missions in British America, the sum of \$1,500, of the aforesaid currency, for the benefit of those Missions.

And to the Treasurer, for the time being, of the Ontario Mission in British America, the sum of \$2,500, of the aforesaid currency, for the benefit of those Missions.

*Held*, that the bequest to the Bishop of Algoma for the benefit and education of John Eskinah and, others, was intended to set apart a fund which was to have perpetual continuance, and in which no individual was to have a personal right, and following *Gilland v. Taylor* L. R. 16 Eq. 584 such bequest was void.

*Held*, also, that the bequest to the Treasurer for the Algoma Missions was a charitable gift, and must fail because no person or body was empowered to hold it as against the Statute of Mortmain 9, Geo. 2, c. 36, in as much as there was no incorporation of Algoma for ecclesiastical or missionary purposes with such powers.

*Held*, also, that the bequest to the Treasurers of the Huron and Ontario Missions, respectively, were intended for the Missions sustained by the Incorporated Synods of the Dioceses of Huron and Ontario, and that by virtue of their Acts of Incorporation both the Dioceses were enabled to hold lands, etc., in mortmain, and that such bequests therefore did not fail either for uncertainty or because they could not be held by their respective defendants.

*Lash*, Q. C., and *J. Mayne Campbell*, for the Bishop of Algoma and A. H. Campbell.

*Walkem*, Q. C., for the Synod of Ontario.

*Betts*, for the Synod of Huron.

*Moss*, Q. C., for the next of kin.

## PRACTICE.

Rose, J.]

[Dec. 5.

MACDONALD v. NORWICH UNION INS. CO.  
CLARKSON v. FIRE INS. ASSOCIATION.

*Examination in discovery—Rule 224, O. J. A.*

One McLean was insured in the defendant companies and becoming unable to meet his engagements, he assigned the policy in the Norwich Union Ins. Co. to the plaintiff, Macdonald, a creditor, to secure his debt, and the policy in the Fire Ins. Association to the plaintiff, Clarkson, as trustee for the benefit of creditors. These actions were brought up on the policies by the assignees.

The order of the Master in Chambers for the examination of McLean for discovery, under Rule 224, O. J. A., as a person for whose immediate benefit the suits were being prosecuted, was affirmed on appeal.

*Shepley*, for the appeal.

*Wallace Nesbitt*, contra.

Rose J.]

[Dec. 5.

KINNEAR v. BLUE.

*Judgment against married woman—Rule 80, O. J. A.*

A motion for judgment under Rule 80, O. J. A. against the defendant a married woman.

*Held*, that since 45 Vict. (O.) c. 19, where there is uncontradicted evidence of separate trading, separate credit and separate estate of a married woman, and an uncontroverted liability for the debt sued for, judgment may properly be entered against the married woman under Rule 80, O. J. A., with execution against her separate estate only.

*F. E. Hodgins*, for the motion.

*J. B. O'Brian*, contra.

## ARTICLES OF INTEREST—NEW RULE IN RECORDS AND WRITS OFFICE—FLOTSAM AND JETSAM.

## ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

- Powers of provincial legislatures to imprison with hard labor.—*Manitoba Law Journal*, July.
- Married women.—*Ib.*, August.
- Sir Edward Fry on punishment.—*Ib.*, October.
- Injunction against criminal acts.—*American Law Review*, p. 599.
- Liability of employer for the wrongful acts of persons serving him in the course of an independent employment.—*Ib.*, p 635.
- Corporate taxation.—(Scope of legislative powers—Double taxation—Foreign corporations—Against whom corporate taxes are assessed—Upon what corporate taxes are assessed—Non-resident shareholders in domestic corporations and resident shareholders in foreign corporations—Need of uniform general system)—*Ib.*, p. 749.
- Allowances for maintenance and education of infants.—*American Law Register*, August.
- Railway insurance.—*Ib.*, September.
- Possession by husband and wife, (The questions involved—Presumptions as to ownership—Delivery between husband and wife—Possessions when fraudulent).—*Ib.*, October.
- Power of partners to withdraw at will from partnerships entered into for a definite period (Civil and foreign law—The English Rule—The American doctrine—Exceptions).—*Ib.*, November.
- Injunctions to restrain slanderous statements.—*Ib.*
- Remedies in cases of criminal contempt (The revision of contempt and proceedings—Collateral remedies).—*Criminal Law Magazine*, September.
- Waiver of trial by jury in cases of felony.—*Ib.*

## LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

- Wilson's Judicature Act, 4th edition, by M. D. Chalmers and M. Muir Mackenzie, London, 1883.
- Treatise on the Law of Pledges, Including Collateral Securities, by Leonard A. Jones, Boston, 1883.
- American edition of Browne on the Law of Carriers of Goods and Passengers by Land and Water, by H. G. Wood, New York, 1883.
- Greenleaf on Evidence, 14th edition, by Simon Greenleaf Cromwell, Boston, 1883.
- Parson on Contracts, 7th edition, by W. N. Kellen, Boston, 1883.
- Carrier's Law, Relating to Goods and Passengers, Traffic on Railways, Canals and Steamships, with cases, by E. B. Watts, London, 1883.

A Summary of the Law of Patents for Useful Inventions, with forms, by W. E. Simonds, New York, 1883.

The Patentability of Inventions, by H. C. Merwin, Boston, 1883.

A Treatise on the Law of Waters, including Riparian Rights, and Public and Private Rights in Waters, Tidal and Inland, by J. M. Gould, Chicago, 1883.

A Synopsis of Copyright Decisions, by W. M. Griswold, Bangor, 1883.

The Law of Marriage and Divorce, as established in England and the United States, by David Stewart, San Francisco, 1884.

The Law of Fraternities and Societies. A book of interest to Masons, Odd-Fellows, Red Men, Druids, etc., with special reference to their insurance feature, by A. J. Hirsehl, St. Louis, 1883.

A Treatise on the Law of Collateral Securities, as Applied to Negotiable, Quasi-negotiable, and Non-negotiable Choses in Action, by W. Colebrooke, Chicago, 1883.

Digest of Moak's English Reports, vols. 16 to 30 inclusive, with a list of Cases Reported, and Table of Cases Affirmed, Considered, Over-ruled or Revised, by J. Simmons; also a Digest of American Notes, by N. C. Moak, Albany, 1883.

Hunt's Law of Boundaries and Fences, etc., 3rd edition, by A. Brown, London, 1884.

Turner's Contract of Pawn, 2nd edition, by F. Turner, London, 1883.

Fisher on the Law of Mortgage, 4th edition, London, 1884.

Key and Elphinstone's Conveyancing, 2nd edition, by the original authors, London, 1883.

Analysis and Digest of the Decisions of Sir G. Jessel, late M. R., with full notes, references and comments, and copious index, by A. P. Peter, London, 1883.

Seaborne's Law of Vendors and Purchasers, 3rd edition, London, 1884.

A Code of Contract Law Relating to Sales of Goods of the Value of £10 and Upwards; a handbook for the use of professional and business men, by H. J. Farrington, London, 1883.

The following notice has been posted up in Osgoode Hall, dated December 12th :—

By direction of the judges of the Chancery Division, the Clerk of Records and Writs is requested, in future to see that all preliminary proceedings are regular before setting a cause down; and to classify motions for judgment into undefended and defended ones.

Solicitors will, therefore, require, in setting down cases for judgment, for default of appearance, or pleading, to

1. File, with the Clerk of Records and Writs the writ of summons, affidavit of service of writ and statement of claim, affidavit of non-appearance, or no defence, proof of the allowance of the service of the writ, when that is necessary under Rule 45.

2. State in the *præcipe* whether undefended, or defended, or if partly defended, and partly undefended.

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